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BRIEF OF RESPONDENTS
IN THE
Supreme Court of the United States

OCTOBER TERM, 1940

No. 802

JOHN A. BOONE, WILLIAM T. BOONE and H. A. MOSELEY, as Executor of the Estate of J. A. Boone, deceased,

v. *Petitioners,*

EQUITABLE HOLDING COMPANY, a corporation; BECKLEY NATIONAL BANK, a corporation; NATIONAL EXCHANGE BANK OF BECKLEY, a corporation; BECKLEY NATIONAL EXCHANGE BANK, a corporation; PHILIP M. SNYDER, MOUNTAIN VIEW REALTY COMPANY, a corporation; HARSHBARGER MILLING COMPANY, a corporation; HORTENSE S. BOONE and C. E. BOONE, Executrix and Executor respectively, of the Estate of W. F. Boone, as assignee of the KANAWHA VALLEY BANK, a corporation; C. E. BOONE, as assignee of KANAWHA VALLEY BANK, a corporation; ELK MILLING & PRODUCE COMPANY, a corporation; THOMAS, FIELD & COMPANY, a corporation; FAYETTE COUNTY NATIONAL BANK, a corporation; C. E. BOONE as Trustee, BANK OF WHITE SULPHUR SPRINGS, a corporation; HORTENSE S. BOONE and C. E. BOONE, Executrix and Executor respectively, of the Estate of W. F. BOONE, as assignee of MARYLAND NEW RIVER COAL COMPANY, a corporation,

C. B. Garnett *Respondents.*
JOHN Q. HUTCHINSON,
Beckley, West Virginia,
MAHAN, BACON & WHITE,
Fayetteville, West Virginia,
Attorneys for Respondents.

WOODYARD PRINTERS, CHARLESTON, W. VA.

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IN THE

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OCTOBER TERM, 1940

No._____

JOHN A. BOONE, et al.,

Petitioners,

v.

EQUITABLE HOLDING COMPANY, et al.,

Respondents.

To the Honorable Justices of the Supreme Court of the United States:

Respondents submit this brief in support of their opposition to the issuance of a writ of certiorari to review the decree entered November 13, 1940, in the United States Circuit Court of Appeals for the Fourth Circuit, in the cause of Beckley National Bank, et al., v. John A. Boone, et al., reported in 115 F. 2d 513.

I

STATEMENT OF THE CASE

J. A. Boone prior to 1920, had been engaged as a coal operator in mining and shipping coal from mines in West Virginia for more than thirty years. In 1920, he retired from the active management of coal mines and moved his residence to Beckley, Raleigh County, West Virginia. He estabished there the business of a steam laundry and became also inter-

ested in a cold storage plant in said town. He executed his last Will, January 18, 1922, devising and bequeathing all of his property, real, personal and mixed, to Tola A. Boone, his wife, and his two sons, John A. Boone, and William T. Boone, in equal shares. He was adjudged insane by the Mental Hygiene Commission of Raleigh County, West Virginia, March 14, 1933, and placed in a sanitarium at Weston, West Virginia, on the 15th day of June, 1933, where he died of senile dementia May 30, 1935, at the age of eighty-one years. After his death his said widow and two children moved from Beckley, to Ashland, Kentucky.

Business Interests

J. A. Boone had four brothers, W. F. Boone, J. D. Boone, D. W. Boone and Daniel Boone, who were associated with him in business for many years and were jointly interested in Boone Coal Company, a corporation, owned equally by J. A. Boone, President, Eli J. Taylor, W. F. Boone and J. D. Boone; New River Export Smokeless Coal Company, a corporation, owned equally by J. A. Boone, W. F. Boone, D. W. Boone and J. D. Boone; Boone Land Company, a partnership, owned equally by J. D. Boone, W. F. Boone and J. A. Boone; Brackens Creek Coal Land Company, a corporation, owned by D. W. Boone, President, J. D. Boone, Treasurer, J. A. Boone and others; Daniel Boone Mining Machine Company, a corporation, owned by Daniel Boone, President, J. A. Boone, Vice President, and others; Plum Orchard Coal Land Company, a corporation, owned by J. A. Boone, President, J. D. Boone, Treasurer, D. W. Boone, and others; New River Land Company, a corporation, owned by J. D. Boone, J. A. Boone, D. W. Boone and others; American Export Corporation, a corporation, owned equally by D. W. Boone, President, J. A. Boone, Vice President, J. D. Boone and W. F. Boone; Prather Coal & Land Company, a corporation, owned by J. A. Boone, President, J. D. Boone, Secretary, and others; Boone Smokeless

Coal Company, a corporation, owned by J. A. Boone, Daniel Boone and others; Raleigh Steam Laundry Company, a corporation, owned by J. A. Boone, President, General Manager and principal stockholder. J. A. Boone and P. M. Snyder owned jointly a building in Beckley, known as the "Morris Building", used as a cold storage plant.

Debts and Judgments

J. A. Boone borrowed for his personal use approximately $102,550.00, and he and his brothers borrowed for New River Export Smokeless Coal Company, Daniel Boone Mining Machine Company, American Export Corporation and Boone Smokeless Coal Company, approximately $231,000.00, to pay for necessary supplies furnished for the continuation and preservation of said corporations. This indebtedness was evidenced by notes made and endorsed by J. A. Boone and his brothers and renewed for many years, the last renewals being in 1928.

In 1929, fifty-six judgments were rendered on said notes against J. A. Boone and his brothers (except W. F. Boone), aggregating $296,337.68. (App. p. 75 and 275, et seq.) (Plfs' Ex. 19). Forty-six of these judgments are listed in the Appendix pp. 277-279.

Business Activities

J. A. Boone prior to 1920, lived at Brown, Fayette County, W. Va., and was General Manager of Brown Coal Company. He then moved to Beckley, where he bought some residence property and some vacant lots upon which he built four tenement houses, managed and collected the rents on these houses until about January, 1930.

He organized the Raleigh Steam Laundry, superintended the construction of the physical plant at a cost of about $156,000.00 and was its active General Manager from August 8, 1923 to

January 8, 1931. During this time he spent from six to eight hours at the laundry nearly every working day. He superintended buying supplies, equipment, collecting and depositing the money in the bank, checking the accounts payable and paying the same usually by check, soliciting laundry over the territory adjacent to Beckley, carefully managing the plant's operation and financing the business. Each week he correctly and efficiently helped to make up a payroll for about one hundred laundry employees. He discussed with engineers the water problems and contracted with Silas Gore, late in 1930, to drill a well for the laundry, which was drilled under his supervision. (App. p. 189, 292-297, 284-285).

In 1926, Boone conceived the idea of constructing a building in Beckley for cold storage purposes, known as the "Morris Building." He explained the plans and blueprints to P. M. Snyder and estimated the cost at approximately $30,000.00. He convinced Snyder that it was a good proposition and the latter invested $30,000.00 in the project, $15,000.00 for himself and loaned Boone $15,000.00. This property was conveyed by Daniel Boone to J. A. Boone and P. M. Snyder by deed dated the 22nd day of November, 1926, and leased November 27, 1926 in the name of Daniel Boone, to the Northwestern Provision Company, at a monthly rental of $375.00. This lease was assigned by Daniel Boone to J. A. Boone, June 3, 1927. J. A. Boone looked after the property, managed it, collected the rent, paid the taxes and correctly accounted to P. M. Snyder for his one-half of the income from November 23, 1926, including 1929. He carried on an intelligent correspondence relative to this property with Snyder from April 4, 1927, through the year 1929. (App. p. 191, 657-665).

In 1928 Boone negotiated and obtained from the George Washington Life Insurance Company a loan of $10,000.00 for the Daniel Boone Mining Machine Company. About the

same time he also obtained a loan of $20,000.00 from the Kanawha Banking & Trust Company of Charleston, West Virginia, for the Daniel Boone Mining Machine Company and pledged $20,000.00 West Virginia Road Bonds as security for the payment of said debt. (App. p. 483).

In February, 1928, he executed four powers of attorney to the Kanawha Banking & Trust Company for the sale and transfer of the four West Virginia Road Bonds, mentioned in the paragraph next above.

He also secured a loan from the Raleigh County Bank for said Daniel Boone Mining Machine Company for $13,000.00. The validity of these loans was never questioned and they have all been paid. (App. p. 484).

He was appointed, by written power of attorney, dated November 15, 1929, to collect and disburse royalties received from Eli Smokeless Coal Company, which he did correctly and satisfactorily. (App. p. 696) (Defs. Ex. Z-30).

He was elected a member of the Council of the City of Beckley, November 26, 1925, receiving 1233 votes, being the third highest number of votes received by any of the sixteen candidates running in said election. He served as Councilman in 1926 and 1927 and attended twenty-four council meetings in 1926 and twenty-six council meetings in 1927. He was renominated as a member of said Council in 1927 and was defeated by one hundred sixty-three votes, receiving only nine votes less than the man who received the greatest number of votes on his ticket. While he was a member of the Council, he was appointed on a Committee to secure from the Chesapeake & Ohio Railway Company the right for the Town of Beckley to build a bridge over the railway tracks and to superintend the construction of said bridge, all of which he did satisfactorily. (App. p. 87).

He was also elected by the citizens of said Town as a member of the Advisory Committee, consisting of five members, and served in said capacity from 1924 to sometime subsequent to May, 1927. During this time the said Committee spent approximately $375,000.00 building sewers and improving and building streets. During this time the Advisory Committee had fifty-four meetings and Boone attended forty-seven. He was familiar with the surveys and maps of the streets and sewers and frequently discussed them with W. J. Campbell, City Engineer. He was also a member of the Street and Sewer Committee, during which time thirty-eight streets were built and four or five sewer lines laid. He was also an active member of the Beckley Chamber of Commerce in 1924 and 1925. (App. p. 87).

He was an active member of the Board of Directors of Beckley National Bank from January, 1922 to April 4, 1930, and attended and took part in a majority of all of meetings of said Board. (App. p. 231-232) (Res. Ex. Z-4).

From 1921 to 1931, inclusive, Boone personally made 617 deposits in the Beckley National Bank aggregating $415,-962.52; and he personally wrote 4408 checks withdrawing said deposits. In 1929 he personally made 82 deposits aggregating $20,451.96 and wrote 546 checks withdrawing $21,-412.41. In 1930 he personally made 60 deposits aggregating $6,842.86 and wrote 402 checks withdrawing $7,694.43. In 1931 he personally made one deposit of $252.50 and wrote 16 checks aggregating $341.35. (App. p. 721).

In 1928 Boone placed some accounts of the laundry company in the hands of attorneys for collection. He wrote said attorneys about these accounts August 1st, October 10, 1928, February 1st, 4th and 25th, 1929. (App. p. 722-725).

He made an affidavit before Francis M. Biggs, Notary Public, June 3, 1931, concerning the sale of the Brown Coal Company property, which occurred in 1920. He also testified

December 15, 1931 in a federal income tax matter before the Honorable Edgar J. Goodrich, Member of the United States Board of Tax Appeals, relative to the sale of this property. (App. p. 82, 419, 516-517, 728).

Boone and his wife executed and acknowledged before Thomas Boone, a Notary Public and a nephew of J. A. Boone, ten agreements and deeds subsequent to January 1, 1929, the last of which is dated November 15, 1929. None of these agreements and deeds have ever been questioned. He also signed and acknowledged many deeds and contracts between 1925 and 1928, inclusive, abstracts of which are mentioned in the stipulation. (App. p. 79-80, 88-90, 666-698).

Boone, acting as Trustee for the Brown Coal Company, collected royalties from Stover Coal Company and receipted for the same for several years. One of these receipts is in the record and is dated June 22, 1929. (App. p. 666).

In August, 1929, he, in conjunction with his attorney, W. H. File, negotiated a settlement with H. A. Robson and others, pertaining to the New River Coal Land Company's property and executed a contract relative thereto, dated August 1, 1929. Because of Boone's financial condition, his stock in this Company which had been formerly in his name, was transferred at his request, to his wife. (App. p. 77 and 159-160) (Def. Ex. A).

In 1927, or in the early part of 1928, he and his brother, J. D. Boone, made a trip to Ashland, Kentucky, and discussed with S. M. Wolffe, Superintendent of Lands for The New River & Pocahontas Consolidated Coal Company about selling said Company 175 acres of coal owned by J. A. Boone and brothers. (App. p. 470).

From the time the Raleigh Steam Laundry was organized until January 8, 1931, Boone assisted H. J. Thorn, Auditor for said laundry, in making its yearly tax returns and frequently

during this time he discussed its accounts with Thorn. (App. p. 265).

In March, 1929, James K. Thomas, an attorney, Charleston, West Virginia, called on Boone to obtain security for some notes of the New River Export Coal Company endorsed by Boone and his brothers and owed to the Elk Milling & Produce Company, and discussed with Boone the latter's financial condition. Boone advised him that he had no property he could pledge as collateral security. (App. p. 636).

On March 8, 1929, Tola A. Boone borrowed $1,000.00 from the Raleigh County Bank on J. A. Boone's endorsement, which note was paid July 16, 1929. (App. p. 253).

Boone was injured August 30, 1930 by an automobile owned and driven by H. A. Moseley. He sued Moseley and the case was tried February 4, 1932. Charles Ritchie represented Boone and Ernest K. James represented Moseley. Boone testified and gave a fairly accurate detailed account of the accident. (App. p. 82, 525 and 731).

The American Export Corporation was organized in 1928 and 1929 for the purpose of taking over all of the Fayette County property owned by J. A. Boone and his brothers, and their corporations, with the hope of selling said property and paying their debts. J. A. Boone was active in organizing said Company and trying to make sale of the property, particularly in the years 1929 and 1930. (App. p. 402 and 442).

J. A. Boone was an active executive officer and member of the Board of Directors, of several of the above named corporations until the latter part of 1931.

J. A. Boone, J. D. Boone and W. F. Boone, trading and doing business as Boone Land Company, instituted a suit in the Circuit Court of Fayette County, West Virginia, against John F. Manns Trustee and others, June 16, 1928, to cancel a coal lease. A final order was entered November 5, 1930, cancelling said lease. (App. p. 93).

J. A. Boone, J. F. Boone and D. W. Boone instituted a general creditors' suit in the Circuit Court of said County against the New River Export Smokeless Coal Company, June 11, 1929. A decree was entered October 28, 1929, referring the cause to a Commissioner in Chancery to take, state and report an account showing all of the property, real, personal and mixed, owned by said corporation, etc. A decree was entered May 14, 1929, enjoining and restraining the creditors of said corporation from making levies and sales under executions. A decree was entered March 20, 1930, denying the motion of J. A. Boone to recommit said cause to a Commissioner in Chancery. (App. p. 94).

The State of West Virginia instituted a suit in chancery in said Fayette County, February 13, 1929 against J. A. Boone and others for the purpose of selling certain lands described therein, belonging to J. A. Boone and his brothers, for the benefit of the school fund, on the ground that the title to the same had been forfeited for the non-payment of taxes. The defendants including J. A. Boone, filed their answers February 14, 1929. (App. p. 94).

In the latter part of 1928, or the first of 1929, the Raleigh Steam Laundry instituted an action against National Surety Company to recover $1,800.00, alleged to have been embezzled by employees of said laundry. (App. p. 404).

In August, 1928, J. A. Boone, acting for Raleigh Steam Laundry, instituted a suit against L. J. Amick. (App. p. 405).

J. A. Boone and Daniel Boone instituted a suit against Sun Coal Company in 1929, in which action Boone testified as a witness. (App. p. 522).

In all of these cases, J. A. Boone was active and showed himself familiar with the subject matter of the litigation. The regularity of these proceedings has never been questioned, although the parties were represented by attorneys and most of the suits contested. (App. p. 402 and 514).

In 1927, Boone, as Vice President of the Daniel Boone Mining Machine Company, negotiated one or two contracts with Covington Mining Machine Company for the manufacture of mining machines. (App. p. 402 and 478).

In May, 1929, Boone borrowed from Ashton File $40.00 and paid him in August, 1929, without being reminded. (App. p. 411).

November 28, 1929, J. A. Boone personally accepted service of notice of motion for judgment in the case of P. M. Snyder against J. A. Boone. (App. p. 76) (Petitioner's Ex. 15).

January 8, 1931, Boone showed W. J. Blakely through the laundry plant, explained its operation, discussed the difficulties and problems of the laundry business with him and suggested that a dry cleaning plant should be established in connection with the laundry. (App. p. 184).

Boone promptly renewed his notes and paid the interest including the year 1928 and some few renewals in 1929.

Intoxication

J. A. Boone's habits relative to drinking intoxicants become important in connection with the expert testimony. The record shows that Boone used alcohol and other stimulants constantly, but with moderation until he moved to Beckley (1920).

Gladys Vaughan Amick, a witness for the petitioners and a sister-in-law of Boone, testified that after 1925 Boone was frequently drunk at his home; that he kept his bottle with him and would frequently come in from the laundry staggering from the excessive use of liquor. (App. p. 106).

H. A. Moseley, a witness for the petitioners testified that Boone usually had plenty of liquor; that in 1930, 1931 and 1932 two drinks would knock him out, several would make him sick, and that he frequently gave Boone liquor. (App. p. 143).

JAMES PUGH, another witness for the petitioners, testified that in 1933 he met Boone at the Beckley Hotel and he was drunk, staggered and fell when he attempted to walk, got out on the street in the way of the traffic, and that he took him off the street. (App. p. 116).

DEWEY MEADOR, teller for the Beckley National Bank, stated a few months before Boone was sent to the Weston State Hospital (June 15, 1933), that he came into the bank complaining with his throat and asked witness to buy some liquor for him and stated if he could get a drink of liquor it would cure him. (App. p. 227).

ISAAC MCKINNEY, assistant cashier Beckley National Bank, stated Boone came in said Bank sometime in 1931 complaining about hoarseness and wanted a drink of liquor. He gave him a drink and he came back the same day and wanted some more liquor. (App. p. 179).

D. W. BOONE stated that his brother had been in the habit of getting drunk about once a month for several years. (App. p. 463 and 468).

DANIEL BOONE also testified that his brother would, at times, drink too much whiskey and get drunk. (App. p. 478).

J. D. BOONE stated that his brother drank quite a lot of liquor over a long period of time and sometimes he would stay on a drunk for as long as a week; that he was using liquor pretty strong when he sold the Brown Coal Mine and continued doing so until the time of his death. (App. p. 539).

GEORGE WILLIAMS, an attorney, testified that Boone was fond of a drink of liquor, and that he often came up to his office to get liquor and that he and Boone drank together. (App. p. 243).

J. B. EARWOOD testified Boone began drinking liquor about four years after he came to Beckley and that two or three years before he was sent away he asked witness for a drink of liquor. (App. p. 117).

Creditors' Suit

The Raleigh County Bank instituted a general creditors' suit in the Circuit Court of Raleigh County, West Virginia, against J. A. Boone, April 19, 1929. In this suit he was represented by the law firm of File, Goldsmith & Scherer. These attorneys made every effort to delay the progress of this suit in order to give Boone and his brothers a chance to make a private sale of the property to pay their indebtedness. A demurrer was filed to the bill, which was sustained December 20, 1929. An amended bill was filed January 11, 1930. Said attorneys filed a demurrer to the amended bill, which was overruled. J. A. Boone then filed his verified answer and also his verified replication and answer to the joint and separate asnwer of the Fayette County National Bank to the bill of complaint. The cause was referred to W. A. Thornhill, a Commissioner in Chancery, to take, make and state a report showing what real estate and personal property J. A. Boone owned, where located, its description, value, the liens against the same, and their priorities. He completed and filed his report June 20, 1930. August 9, 1930, a decree was entered re-referring said cause to the said Commissioner and he filed a supplemental report the 15th day of November, 1930. The said reports of the Commissioner in Chancery were confirmed and Special Commissioners were appointed to make sale of Boone's real estate by decree entered November 15, 1930. His Raleigh County real estate was sold to the respondent, Beckley National Bank, for $38,200.00, and it was conveyed to said Bank by deed dated March 20, 1931, recorded the same day. A part of Boone's Fayette County real estate was sold to the respondent, Mountain View Realty Company for $6,000.00, and conveyed to it by deed dated May 12, 1932, recorded June 15, 1932, and the residue of the Fayette County property was sold to P. M. Snyder for $4,000.00, and conveyed to him by deed of April 18, 1931, recorded April 22, 1931. All sales were confirmed February 16, 1931. Boone's personal property, consisting

principally of shares of capital stock, was also sold in said suit for $24,140.00.

Beckley National Bank conveyed a part of the real estate it bought in said creditors suit to Mike Verde by deed dated July 15, 1931, and the remainder to Equitable Holding Company by deed dated March 26, 1932. Both of these grantees placed valuable improvements upon said real estate subsequent to their purchase and before the institution of the instant suit. Mountain View Realty Company also conveyed nearly all the real estate it bought in said creditors' suit to innocent purchasers for a valuable consideration. Five of its grantees filed petitions in the instant suit, setting out the conveyances to them and the consideration paid therefor and asked to be made party defendants, and that no decree be entered to their prejudice. The District Court in its final decree took time to consider the matters arising upon said petitions.

Four creditors' suits were instituted in the Circuit Court of Fayette County, West Virginia, one against D. W. Boone, one against J. D. Boone, one against New River Export Smokeless Coal Company, and one aaginst J. D. Boone Coal Company. All of these suits were pending at the same time as the creditors' suit against J. A. Boone. All of the property of these debtors was also sold in said suits.

II

HISTORY AND PURPOSES OF PENDING SUIT

There were originally two suits, 3507 and 3509. Both were instituted in the District Court of the United States for the Southern District of West Virginia, November 13, 1935. They were consolidated by order entered May 26, 1937. The plaintiffs in suit 3507 were Tola A. Boone, John A. Boone and William T. Boone, by his next friend, Tola A. Boone. The defendants were the creditors of J. A. Boone, the purchasers of Boone's personal property and real estate at the judicial sales, and the grantees of said purchasers.

The plaintiff in suit 3509 was Tola A. Boone, and the defendants were Equitable Holding Company, Beckley National Bank and Beckley National Exchange Bank.

Tola A. Boone died testate December 17, 1936, and the suit proceeded in the name of her sons, John A. Boone and William T. Boone, by order entered February 7, 1938.

In 1935 Tola A. Boone claimed a right of dower in all the real estate formerly owned by her husband. The Beckley National Bank and the Equitable Holding Company paid her $10,280.00 for her dower in the Raleigh County lands and she executed releases to each of said corporations, dated August 28th and November 23, 1935. November 14, 1935, she instituted suit (3508) in the District Court of the United States for the Southern District of West Virginia against Mountain View Realty Company, H. W. Todd, George M. Fryberger, William D. Himes and John Nuttall, as trustees of the estate of John Nuttall, deceased, for the assignment of dower in the Fayette County lands formerly owned by her husband. This suit was abated by her death. (App. p. 92).

The objects of suit 3507 are to set aside the judgments against J. A. Boone; to perpetually enjoin the collection of said judgments from his estate, his heirs, devisees and distributees; to annul the sale of his real estate and personal property made by said Special Commissioner in said general creditors' suit; to cancel certain deeds made by Special Commissioners to the purchasers of Boone's real estate; to take money judgments in favor of J. A. Boone and William T. Boone against the Beckley National Bank, Mountain View Realty Company, Equitable Holding Company and P. M. Snyder, for the net income received by them from the property purchased at the Special Commissioners sale.

The objects of suit 3509 are to set aside the sale of 284 shares of Raleigh Steam Laundry stock; 4 shares of Raleigh County Fair Association stock; 118 shares of Prather Coal &

Land Company stock; and 1650 shares of New River Export Smokeless Coal Company stock made by a Special Commissioner in said creditors' suit January 15, 1929; and recover a money judgment against the Beckley National Bank, the purchaser of said shares of stock, for the net income received therefrom.

The said shares of stock were pledged by J. A. Boone as collateral to secure the payment of his personal notes and also notes of his companies, endorsed by him. All of this stock is worthless, except the Raleigh Steam Laundry stock. (App. p. ------).

The grounds upon which the plaintiffs (petitioners) seek to accomplish the objects of these suits are:

(1) J. A. Boone was mentally incompetent at the time he made and endorsed the notes which were the basis of the judgments sought to be annulled, at the time he pledged the above capital stock as collateral and at the time of the institution and prosecution of the general creditors' suit against him.

(2) No guardian ad litem was appointed for Boone at any time.

(3) Boone's attorneys carelessly and negligently failed to make the defense of his alleged mental incompetency.

All of the defendants who were creditors of Boone, filed their answers setting up the notes owed to them by Boone and the judgments obtained thereon. The defendants who were the purchasers of Boone's property at the Special Commissioners' sale and their grantees filed their answers setting up the consideration paid for said property, their deeds and possession. All of the defendants denied that Boone was mentally incompetent at the time the notes were given, judgments were rendered and at any time during the pendency of the general creditors' suit, and also denied that they had any information relative to Boone's alleged mental incompetency during this period.

The case was referred to L. S. Echols, Special Master, who filed his report April 11, 1938. (App. p. 2-16).

The respondents filed exceptions to said report. (App. p. ——).

The District Court entered a final decree April 4, 1940, (App. p. 45) overruling defendants' exceptions and confirming the Special Master's report in its entirety, finding and adjudging inter alia:

(1) J. A. Boone was mentally competent until January 1, 1929, and mentally incompetent at all times subsequent thereto, and all the obligations evidenced by the notes made and endorsed by him and each renewal are valid, legal existing debts against his estate.

(2) All the judgments against J. A. Boone, except two judgments in favor of Raleigh County Bank, rendered September 11, 1928, were set aside and held for naught and the defendants and all other judgment creditors of J. A. Boone were perpetually enjoined and restrained from collection from the estate of J. A. Boone, his heirs, devisees and distributees all of the judgments against him, except the two in favor of Raleigh County Bank.

(3) All the orders, decrees and proceedings in said general creditors' suit, all deeds from Special Commissioners to the purchasers of Boone's real estate, sold in said creditors' suit were cancelled, set aside and held for naught, without prejudice to the titles of Mike Verde, H. W. Todd and others, as trustees of the John Nuttall estate. (App. p. 9-16).

(4) H. A. Moseley, one of the executors of the will of J. A. Boone, was made a party (intervenor) April 4, 1940, and a judgment was rendered in his favor against the Mountain View Realty Company for $13,714.86; a judgment against the Beckley National Bank $31,658.48; a judgment against Equitable Holding Company for $10,904.51, and a judgment

against P. M. Snyder cancelling and setting aside the deed of the Special Commissioners to him, when he has collected rents and royalties from the property sufficient to pay his judgment, without making any provision for a refund of $4,000.00 paid for said property. Said executor was also authorized and directed to take possession and hold Boone's real estate until the affairs of his said estate were settled, except that part of said real estate conveyed to Mike Verde, and to the trustees of John Nuttall estate. (App. p. 50). Under this provision all the present owners of Boone's real estate (except Mike Verde and the trustees of John Nuttall's estate) were ejected from their property.

(5) The decree further provided that it was without prejudice to the right of John A. Boone and William T. Boone to assert their claim to rents and royalties from the real estate of J. A. Boone, subsequent to his death, and without prejudice to their rights or their counsel to apply for an allowance of counsel fees to be paid by the defendants.

III

ARGUMENT ON THE THREE ALLEGED ERRORS

First

The first assignment of error raises the legal question, whether under the law of West Virginia the failure to appoint a guardian ad litem for an incompetent renders a judgment against him void or voidable.

The petitioners rely upon the cases of *Ferrell* v. *Ferrell*, 103 W. Va. 704, 138 S. E. 399, and *Queen* v. *Caldwell*, 112 W. Va. 215, 164 S. E. 35.

In the first case several of the defendants were known to be infants and were so designated in the suit. They were not served with process. A guardian ad litem was appointed for them, but he filed no answer. The court held that the ap-

pointment of the guardian ad litem was equivalent to the issuing of process, and the filing of his answer to the service of process; that since no answer was filed and no process was served upon the infants, they were not before the court. Therefore, no valid decree could be entered against them for lack of jurisdiction.

In the second case, the question before the court was whether a deposition taken without notice to the guardian ad litem and in his absence could be read against an infant. This question is controlled by statute, West Virginia Code 1913, c. 83, sec. 4 and sec. 3585, Code 1937.

In the suits against Boone in 1929, he was sued as a sane person. He was not adjudged insane until March 14, 1933. At the time of these suits, he was going about doing business as a normal man. In the creditors' suit instituted April 19, 1929, he employed counsel to represent him, namely, Ashton File, President of the West Virginia Bar Association 1939-1940; W. H. File, now Judge of the Tenth Judicial Circuit of West Virginia; W. W. Goldsmith and L. L. Scherer. All these men are good and careful attorneys and efficiently represented Boone. The plaintiffs and the numerous creditors had no knowledge of any mental infirmity on the part of Boone. There was nothing that suggested to the trial court the mental incompetency of Boone. How could the plaintiffs in said suits be expected under these circumstances to know that he was mentally incompetent, when the courts have had extreme difficulty in determining this controversial matter?

Under the law of West Virginia, the failure to appoint a guardian ad litem for a person mentally incompetent is not a jurisdictional defect. Therefore, a judgment against an incompetent in this state is voidable and not void.

Hull v. *Hull's Heirs*, 26 W. Va. 1,
Withrow v. *Smithson*, 37 W. Va. 757, 17 S. E. 316;
Hayes v. *Camden*, 38 W. Va. 109;

Alexander v. *Davis*, 42 W. Va. 465, 26 S. E. 291;
Eakin v. *Hawkins*, 52 W. Va. 124, 43 S. E. 211;
Curtis v. *Rwy. Co.*, 68 W. Va. 762, 70 S. E. 776;
Chapman v. *Branch*, 72 W. Va. 54, 78 S. E. 231;
Lynn v. *Collins*, 77 W. Va. 592, 87 S. E. 934;
Morris v. *Hall*, 89 W. Va. 460, 109 S. E. 493;
Andrews, et al v. *Floyd, et al*, 114 W. Va. 96, 170 S. E. 897.

The law of these cases is in harmony with the general authorities.

Montague v. *County*, 200 Io. 534;
Ward v. *Miller, et al*, 84 S. E. 480 (Ga.);
Hood Comrs. etc. v. *Holding*, 171 S. E. 633 (N.C.);
Bank v. *Duke, Adm'r.*, 34 A. L .R. 215, Anno. p. 221;
32 C. J. 789, Sec. 651 (4);
Id 791, Sec. 657.
28 AM. JUR. 744, Sec. 114;
BLACK ON JUDGMENTS, Vol. 1, Sec. 205;
FREEMAN ON JUDGMENTS, Vol. 1, Sec. 152;
Kevan v. *Life Ins. Co.*, 3 Fed. Sup. 288, Point 7 Syl.

The rule of law is also well established that a judgment rendered against an insane person before inquisition will not be set aside on the ground of insanity alone. It must be shown that the defendant had a meritorious defense to the claim. The court will not do a futile thing.

The special master found and reported that the judgments against Boone (except two in favor of the Raleigh County Bank) and the several orders and decrees in the creditors' suit were voidable. (App. p. 16). The District Court affirmed this report in its entirety. (App. p. 45). The petitioners did not appeal and did not cross-assign error on this point. In our opinion they cannot now be heard to say that the judgments, orders and decrees are void, because they are bound by the decree.

Second

The second alleged error in our opinion is without merit for the following reasons:

(1) The attorneys for the petitioners in discussing this alleged error in their brief say that the Circuit Court of Appeals did not discuss the rights of the creditors. The issue before the court was whether the record shows that J. A. Boone had sufficient mental capacity to understand an ordinary business transaction, when the orders and decrees were entered and pronounced against him. The court decided this issue in favor of Boone's mentality and there was no reason for it to discuss the rights of the creditors. The fact that some of the judgment liens against Boone were not reached in the distribution of the money received from the sale of his property has nothing to do with his sanity or insanity. It is obvious that H. A. Moseley, as one of the executors of J. A. Boone, has no interest in this suit to prosecute or rights to protect if Boone was mentally competent when the orders and decrees were rendered against him.

(2) This suit was instituted and prosecuted to defeat the creditors in the collection of their claims and judgments. H. A. Moseley, as executor, etc., is hostile to the interest of the creditors. In his petition asking to intervene in this suit he adopts the allegations of plaintiffs' bills of complaint and joins in the purposes and objects of the suit. It is, therefore, apparent, that he did not intervene for the creditors. The allegations of the petition make him a legal ally of Boone's devisees in their attempt to defeat the creditors.

(3) The creditors who received nothing in the general creditors' suit are not asking and do not desire that the judgments against Boone be annulled, that the orders and decrees be set aside, and that the sales and the deeds for his property be cancelled; neither is any creditor attacking the priority of

another creditor. Why then should the executor be complaining except for the commissions which he hopes to receive for his services?

(4) All of the creditors are not before the Court. Some of them were paid in full out of the money received from the sale of Boone's property and were never made parties to this suit. Others of them who were originally made parties defendant subsequently released their judgments and some of them also released the notes upon which their judgments were based. All were dismissed from the suit by order, because their judgment liens were too remote to be reached.

(5) All of Boone's real estate has passed into the hands of innocent purchasers. Buildings have been erected thereon at great cost and other improvements made. The position of the parties and creditors of Boone has changed and some of the banks have been dissolved. It is now impractical to place the parties and creditors in status quo. An attempt to do this would lead to confusion, inconvenience and injustice.

Third

The respondents say that the Circuit Court of Appeals did no violence to Rule 52(a) in reversing the decree of the District Court for the following reasons:

(A) This rule is not applicable because much of respondents' evidence is documentary and the weight to be given such evidence does not depend upon the credibility of witnesses.

Carter Oil Co. v. *McQuigg, et al.*, 112 F. 2d 275.

(B) The findings of the Special Master, confirmed and approved by the District Court, while persuasive and entitled to due regard and weight, are not controlling.

Aetna Life Ins. Co. v. *Kepler*, 116 F. 2d 1;
National Manufacturers & Store Corp. v. *Whitman*, 93 F. 2d 829;

Hoeltke v. *Kemp Mfg. Co.*, 80 F. 2d 912;
Standard Acc. Ins. Co. v. *Simpson*, 64 F. 2d 583;
General Finance Corp. v. *Keystone Credit Corp.*, 50 F. 2d 872.

(C) The Special Master's report and the District Court's decree are clearly erroneous for the following reasons:

(1) THE TESTIMONY AND DOCUMENTARY EVIDENCE CLEARLY SHOWS THAT J. A. BOONE WAS MENTALLY COMPETENT TO UNDERSTAND AN ORDINARY BUSINESS TRANSACTION, WHEN THE ORDER AND DECREES WERE RENDERED AGAINST HIM.

DOCTORS

There was no doctor who testified for the petitioners who saw J. A. Boone before he was adjudged insane by the Lunacy Board of Raleigh County, except Dr. A. E. Amick, a brother of Tola A. Boone.

Dr. D. B. Jarrell was acquainted with Boone from 1921. He was one of his family physicians and treated him for minor ailments on different occasions. Witness was a member of the Lunacy Commission of Raleigh County for about eleven years and assisted in conducting the lunacy examination of Boone in March, 1933. He states in his official certificate dated March 14, 1933, that indications of Boone's insanity first appeared about one year prior to said date, or in March, 1932, and it had been one year since Boone's abnormal actions, such as wandering away from home, loss of memory and loss of orientations, etc., were first noticed. He testified that this information was obtained from personal observation, examination of Boone and also from information given him by Mrs. Tola A. Boone and other relatives. (App. p. 312-313). Witness also testified that Boone frequently visited his office and that he was a stockholder of Raleigh Steam Laundry and was on the Board of Directors of the Beckley National Bank with Boone and dis-

cussed banking business and other general business matters with him from 1928 to April 4, 1930; and that Boone was an active member of the Board of Directors of said Bank, took part in the discussion of the business of the Bank which came before the Board; that he saw nothing wrong with his mind prior to 1932. (App. p. 314).

Dr. E. S. Dupuy knew Boone since 1920 and lived near him, on the same street for a number of years. Witness treated Boone, December 3, 1920, twice in 1928, May 17, 1931 and at other times in 1931, and March 1, 2 and 9, 1932. He talked to him frequently on other occasions. He also treated Boone's children in the latter's home. Witness also stated he saw no indication of mental weakness in Boone prior to March, 1932. (App. p. 427).

Dr. W. W. Hume testified he had practiced his profession in Beckley for thirty-six years; was health officer of Raleigh County and a member of the board of directors of Raleigh Steam Laundry from 1922 to January 8, 1931. Witness often discussed the laundry's affairs and other business affairs with Boone and considered him mentally competent and capable of understanding ordinary business transactions until a year or two before he was sent to the asylum in June, 1933. (App. p. 429).

Dr. K. M. Jarrell knew Boone during the time he was in Beckley and treated him on a few occasions. Witness was a director in the Beckley National Bank during the time Boone was also a director. Witness also had business transactions with Boone and did not notice anything which indicated mental infirmity on his part. (App. p. 433).

Dr. Robert Wriston was a member of the Lunacy Commission of Raleigh County ten or twelve years and was one of the doctors who assisted in the lunacy examination of Boone in March, 1933. In his official certificate dated March 14, 1933, he stated that Boone's abnormal actions were first noticed and that indications of insanity first appeared in him about one year

prior to the date of the certificate, or in March, 1932; that this information was obtained partly through personal observation and examination of Boone and from the testimony of witnesses who appeared before the Board on March 14, 1933. Witness also testified that he was vice-president of the board of directors of the Raleigh County Bank and a member of the discount committee of said bank, which passed upon loans; that the bank had done business with Boone and that he had observed him. In his opinion Boone was mentally competent prior to 1932. (App. p. 347-352).

Dr. J. C. King, a physician of Radford, Virginia, superintendent of Saint Albans Sanatorium, and for the greater part of the last thirty-five years devoted to the treatment of nervous and mental diseases, was called as an expert witness and testified that senile dementia is a progressive disease which ordinarily runs its course from four to six years, but in a man of Boone's age probably from one to two years; that when the disease once sets in there are no lucid intervals; that if evidence of senile dementia was apparent in Boone in 1921, 1922 or 1923, by 1925 the disease would have progressed to such an advanced degree, and disintegration of the mental faculties would have been so great, as to be evident to anyone who had contact with him; that it would have been impossible for Boone to have conducted himself properly before the public eye, to have acted intelligently, to have written intelligent letters in 1928 and 1929, to have deposited money in the Beckley National Bank and correctly drawn checks against said deposits from 1921 to 1931, to have managed the business of the Raleigh Steam Laundry from August 8, 1923 to January 8, 1931, to have collected and correctly distributed money, to have been an active member of the board of directors of Beckley National Bank from January, 1922 to April 4, 1930, to have been an active member of the advisory committee of the city of Beckley from 1924 to 1927, inclusive, to have instituted and prosecuted a number of suits from 1928 to 1930, to have testified accurate-

ly in law suits in 1928-30-31-32, to have signed and acknowledged deeds, contracts and affidavits in 1928 and 1929, and to have engaged in other business activities shown by the record. Witness stated in his opinion senile dementia began in Boone sometime in the year 1931. Witness also stated that about all of the abnormalities of Boone testified to by petitioners' witnesses (except change in personality), such as lapse of memory, living in the past, delusions that a pony had been stolen and ridden to death in 1921, walking in the street instead of on the sidewalk, rubbing his head, staring into space with his mouth open, drolling, picking up old nails, delusion that dishes were broken and a closet disarranged in 1922, repeating stories, getting in the way of automobile trucks, delusion that the chickens were starving in 1923, delusions that rugs were being destroyed in 1924, that his boys were stealing glass jars from the basement of his house in 1926, and that he was hunting wild hogs in 1924, talking to himself, failing to recognize his friends, complaining about his servants burning old shoes in 1926 and 1927, forgetting the name of his wife and failing to recognize her and his children in 1928-1929 and other similar acts, could all be explained by acute alcoholic intoxication or the immediate effect of drugs. Witness stated that petitioners' testimony could not be reconciled with respondents' documentary evidence on the theory that the acts of Boone were the result of senile dementia. Witness also stated that some occurrences, which are given as examples of lapse of Boone's memory, can be satisfactorily explained on the basis of some personal motive of his, viz: W. R. Vennoy incident about the sale of real estate to Boone, which is said to have occurred sometime between 1923 and 1926; F. H. Kohne incident in 1929 about his alleged agreement with Boone, that he was to be paid one hundred dollars in cash if Boone discharged him as an employee of the laundry; Earl Harper incident in 1928 in regard to a dispute between him and Boone about the latter paying for a load of coal; James B. Eaken alleged agreement

with Boone that he was to receive a salary and three per cent of all dividends as manager of Raleigh Steam Laundry, which Boone denied. In each of these incidents it is significant that Boone always forgot in his favor and never against his interest. (App. p. 554).

Dr. R. G. Blackwelder, a physchiatrist at the Huntington State Hospital, Huntington, West Virginia for four years, also testified as an expert witness to about the same things as Dr. J. C. King. He, likewise, said that practically all of the abnormalities of Boone, testified to by petitioners' witnesses, could be explained by acute alcoholism, and that said testimony could not be reconciled with Boone's actions on the theory of senile dementia. Witness stated that in his opinion senile dementia began in Boone in the latter part of 1931 or early in 1932. (App. p. 610).

Dr. H. O. Van Tromp, a physician connected with the Weston State Hospital since March, 1931, called as witness for the petitioners, testified that he never saw J. A. Boone until he was admitted to said hospital, and that he never made any physical examination of him at any time. Witness said that if Boone did the things set forth in petitioners' hypothetical question because of senile dementia, that in his opinion he was mentally incompetent to transact ordinary business as early as 1923. He stated on cross examination that if Boone in 1926 conceived the idea of purchasing business property at a price of $30,000.00 and installed a cold storage plant in said property, leased the same, collected the rents and regularly accounted to his associate correctly for one-half thereof, paid the taxes and other assessments, carried on correspondence with his associate relative thereto from April 4, 1927 including 1929, that Boone was competent to understand an ordinary business transaction. He further said that his opinion as to when Boone became incompetent was based entirely upon petitioners' hypothetical question. (App. p. 145-147).

DR. EDWARD F. REASER, an assistant superintendent of the Huntington State Hospital, was an expert witness for the petitioners, and testified from petitioners' hypothetical question that in his opinion Boone was mentally incompetent to do business in 1923. On cross examination he stated that his opinion was not worth anything if Boone's acts mentioned in the hypothetical question were due to drinking liquor; that he had no knowledge concerning Boone except what was contained in said hypothetical question. Witness also stated on cross examination that if Boone was mentally able to handle the details of a business proposition involving many thousand dollars and retain the details in his mind, and able to carry on business transactions intelligently after the year 1923, that his opinion concerning Boone's mental capacity was wrong. (App. p. 149).

The variance in the testimony of the expert witness is chiefly as to the time when senile dementia first began in Boone. This is explained on the ground that a different state of facts were assumed in the two hypothetical questions.

Respondents' documentary evidence clearly establishes that Boone did do business intelligently as late as February, 1932. It necessarily follows that if the premises of the petitioners' hypothetical question are false, the testimonial conclusions based thereon must be disregarded.

ATTORNEYS

Many attorneys appearing in litigation in which Boone was a party, testified on behalf of the respondents, but none testified for the petitioners.

W. H. FILE, a member of the law firm of File, Goldsmith & Scherer, testified that he knew J. A. Boone quite well from 1922; that said firm had represented Boone in nearly all of his business for many years; that he was city attorney of Beckley from 1924-1933, including the year 1924 when Boone was a member of the advisory committee for said city; that he fre-

quently saw Boone in the council meetings, on the street and in his office; that on two or three occasions in the year 1929 he made trips to Fayetteville, W. Va. with Boone in connection with his interest in the New River Coal Land Company; that he talked with the witness about his business affairs. Boone gave the witness information about some New River Coal Land Company stock pledged as collateral with J. S. Lewis. A contract was prepared in connection with this matter. Boone discussed said contract and apparently understood it and signed it on August 1, 1929. At that time Boone requested that the stock in said company which had formerly been in his name be issued in the name of his wife. Witness noticed no mental failure of Boone until the spring or fall of 1932. (App. p. 154).

Ashton File, a member of the firm of File, Goldsmith & Scherer, knew Boone from 1902 to 1933. He had been attorney for Boone and for all of his companies located in Raleigh County for many years. Witness was a member of the Board of Directors of the Bank of Raleigh which loaned Boone large sums of money. Witness was associated with Boone on the Board of Directors of the Daniel Boone Mining Machine Company and was frequently in directors' meetings with Boone and discussed business matters with him. Witness had many business dealings with Boone from 1924 to 1933. In May, 1925, J. A. Graft brought suit against Boone. In the latter part of 1928 or 1929 Boone on behalf of the Raleigh Steam Laundry Company instituted suit against National Surety Company, and in August, 1928, said laundry instituted another suit against I. J. Amick. In 1929 J. A. Boone and others instituted a creditors' suit against New River Export Coal Company. Said firm represented Boone in all of this litigation and witness discussed all of these cases with him, and he showed himself familiar with the facts. Witness also represented Boone in the creditors' suit of Raleigh County Bank against J. A. Boone from the beginning of said litigation until it ended. He frequently discussed this suit with J. A. Boone and his wife,

Tola A. Boone, and both of them were familiar with all of the facts connected with said litigation. Boone was also familiar with the affairs of all the companies in which he was interested. Witness loaned Boone $40.00 in May, 1929 and he paid it back in August, 1929 without being reminded. Boone seemed worried at times about the loss of his property. Witness noticed no indication of mental incompetency in Boone until about the year 1932. (App. p. 402).

L. L. SCHERER, a member of the firm of File, Goldsmith & Scherer, frequently saw Boone in the office and was of the opinion that he was mentally competent in 1929 and 1930. Saw no change in Boone until about six months or a year before he was sent to the Weston State Hospital. (App. p. 364).

C. E. MAHAN, Attorney at Law, Fayetteville, West Virginia, came in contact with Boone about 1920 and represented him in different matters until 1931. Recalled discussing with Boone on one occasion a suit of Boone Land Company v. John F. Mann, as trustee and others. He obtained from J. A. Boone and brothers the information from which to prepare an affidavit relative to the sale of the Brown Coal Mine. This affidavit was executed by Boone before Francis N. Biggs, Notary Public, June 3, 1931. Witness represented the Boones in a federal income tax proceeding before the Honorable Edgar J. Goodrich, December 15, 1931, in which proceeding Boone testified on said date. Witness also represented Boone in other litigation and business matters, including the organization of American Export Corporation in 1928 and 1929, and had frequent conversations with him from 1924 to 1931, relative to his personal business and business in connection with the companies in which Boone was interested. Boone showed himself familiar with all of these matters. Witness did not observe any inability of Boone to associate facts or carry on conversation relative to business during all of his negotiations with him. (App. p. 514).

W. W. GOLDSMITH was a member of the firm of File, Goldsmith & Scherer and handled legal business for J. A. Boone from 1925 to 1931 and was acquainted with him from about 1923 or 1924. He was in close touch with Boone and had many conferences with him in regard to his personal business matters and also matters connected with the laundry company and the Daniel Boone Mining Machine Company. Witness discussed with Boone several judgments against him, took several trips with him in connection with litigation in which he was interested, assisted in defending Boone's interest in the chancery cause of Raleigh County Bank v. J. A. Boone, and represented Boone generally in Raleigh County. Witness also consulted with Tola A. Boone in regard to said creditors' suit. She never, at any time, suggested that there was anything wrong with her husband's mind or that he acted peculiarly, or did anything which indicated mental incompetency. Witness thinks Boone was able to understand ordinary business transactions until sometime after the year 1931, although he was eccentric and had a habit of telling lengthy stories of occurrences that happened many years ago, and he was of the opinion Boone had lost his sense of lapse of time. (App. p. 529).

CHARLES RITCHIE, Attorney at Law, Charleston, West Virginia, represented J. A. Boone in an action against H. A. Moseley, tried February 4, 1932. Witness obtained the facts from Boone to prepare the declaration and prosecute this suit. Witness also talked to Tola A. Boone and H. A. Moseley, the defendant, in regard to said action. Boone testified in the case. He was rather feeble and not active like a young man, but was fairly accurate in his testimony and he saw nothing which indicated Boone was mentally incompetent. (App. p. 525).

W. A. RIFFE was City Recorder from 1922 to 1924 and Police Judge from 1928 to 1930. He knew Boone during these years and had frequent conversations with him, used to discuss with him the history of Raleigh and Fayette Counties, concerning which Boone was very familiar. The earliest in-

dications of any change in Boone, noticed by witness was in the summer of 1932. Prior to this time and in 1931 and 1932, witness saw and talked with Boone frequently. (App. p. 380).

GEORGE WILLIAMS practiced his profession in Raleigh County since 1902 and knew Boone for forty years. Boone came to his office and he frequently discussed business matters with him as late as March, 1931, and told him about his indebtedness. Witness thinks Boone was mentally capable of transacting business and saw no change in Boone until about August or September, 1931. (App. p. 245).

A. W. HAMILTON, a witness eighty-one years of age, president of Fayette County National Bank for approximately thirty years, an attorney for many years and was intimately acquainted with Boone for over fifty years, saw Boone and talked with him in 1928 or 1929, about his laundry business and family. Witness stated that Boone was then just as he always had been and he saw nothing abnormal in his mental condition and in his opinion Boone was perfectly capable of attending to business in 1928 and 1929. (App. p. 501).

JAMES K. THOMAS, a member of the law firm of Ritchie, Hill & Thomas, Charleston, West Virginia, talked with Boone at the office of Raleigh Steam Laundry, Beckley, West Virginia, between the 10th and 16th of March, 1929, in an effort to secure from Boone some additional collateral on the note of the New River Export Smokeless Coal Company, payable to the Elk Milling & Produce Company, endorsed by J. A. Boone and D. W. Boone. Witness discussed this obligation with Boone who seemed to be very familiar with it and told the witness that everything he had was tied up and it was impossible for him to give any additional collateral. Boone also discussed other matters with witness. Witness also testified that he was present and heard J. A. Boone testify in the Circuit Court of Kanawha County, February 4, 1932, in the action of J. A. Boone against H. A. Moseley; that Boone was mentally normal

when he talked with him at his office in Beckley and when he testified in said law action. (App. p. 636).

BUSINESS MEN

ISAAC MCKINNEY, assistant cashier of the Beckley National Bank, testified that Boone kept a checking account at said Bank from 1921 to 1931, and that Boone personally made deposits to the credit of said account and personally wrote checks against the same, and that witness handled the said checks, and that he frequently talked with Boone about business matters, that he never saw anything indicating that he was mentally unsound until about 1931, when he came in the Bank twice on the same day and each time wanted a drink of liquor. Witness also testified somewhat in detail concerning the notes and obligations owed by Boone to the bank. (App. p. 167 and 336).

W. T. BLAKELY, testified that in 1931 he and his associates bought 501 shares of the Raleigh Steam Laundry stock, 284 shares of which was formerly owned by J. A. Boone. Witness went to Beckley, January 8, 1931, to take charge of said laundry and at that time saw J. A. Boone in his office at said laundry. Boone took him through the laundry plant, discussed the general cost of the laundry business, the coal companies business which the laundry was getting at that time, the difficulties that confronted the laundry with reference to competition and otherwise, and the dry cleaning situation. Boone explained to him that all of the dry cleaning business was then being brokered out of the plant and suggested that a dry cleaning plant should be established in connection with the laundry. Witness testified that Boone discussed these matters intelligently and that he was then competent to transact the ordinary affairs of business. (App. p. 184).

RONALD SNYDER, the son of P. M. Snyder, became acquainted with J. A. Boone about fifteen or twenty years ago. Witness worked in P. M. Snyder's office at Mount Hope, W.

Va., where he frequently saw J. A. Boone. In 1926 Boone came to said office about a lease to the Northwestern Provision Company and wanted to raise some money. Boone had made and had with him an estimate of the cost of constructing and equipping the building amounting to $30,000.00. Witness further stated that his father, on Boone's representations, invested $15,000.00 in said project and loaned $15,000.00 to J. A. Boone to invest therein, and introduced two checks for $15,000.00 each, both made payable to Boone and dated November 23, 1926. Witness also introduced in evidence the original letters between his father and J. A. Boone, copies of which are found in the record. Witness further stated Boone was frequently in his father's office and discussed business matters. Witness never noticed anything peculiar in Boone's conduct and was of the opinion that he was competent to transact business in 1926 and afterwards. Witness also heard Boone agree with P. M. Snyder that the latter might take a judgment on the balance due on the $15,000.00 loaned to the said Boone. (App. p. 191).

J. E. LaRue, a civil engineer, did some work for Boone from 1923 to 1926 and frequently discussed with him the matters connected with said work. He knew Boone until he was sent to the State Hospital at Weston. Witness stated, in his opinion, Boone was a competent business man and was able to understand ordinary business transactions and their consequences until about a year before he was sent to said hospital. (App. p. 206).

E. Ray Bailey, was city recorder of Beckley in 1926 and 1927 and knew Boone when he was a member of the council. He testified Boone was the most regular and active member on the council. After Boone's service on the council witness saw him possibly two or three times a week and talked with him on these occasions. The last time he saw Boone and talked with him was in June, 1932. At that time Boone's mental condition was good. (App. p. 223).

DEWEY MEADOR was bookkeeper at the Beckley National Exchange Bank and worked for about thirteen or fourteen years for the Beckley National Bank. Witness was familiar with the ledger sheets of the Beckley National Bank for the years 1921 to 1931, inclusive, showing the personal account of J. A. Boone from September 2, 1921, to January 13, 1931, inclusive. During this period of time witness saw Boone quite often and accepted the deposits both on his personal account and laundry deposits; frequently discussed business matters with him touching his account at the bank and otherwise. Witness stated that during all the time from 1921 to 1931 inclusive, he saw nothing in Boone's demeanor, conversation or action indicating any mental infirmity on his part and that Boone was competent, intelligent and able to properly transact business during all of this time. Witness further stated he did not observe any mental deficiency in Boone until about two months before he was sent to the hospital. About that time he came to the bank and begged someone to buy him a drink of liquor, which was the first indication witness had of anything mentally wrong with Boone. (App. p. 227).

WALTER J. CAMPBELL, a civil engineer employed by the advisory committee of the City of Beckley from 1924 to 1927, inclusive. During this time J. A. Boone was a member of said committee and about thirty-eight streets were paved and four or five miles of sewer laid. Witness stated Boone was a very active member of said committee and went over the estimates of the street paving and sewer construction carefully and checked over the bills and expenditures in connection with the administration of said work. Witness also stated Boone consulted with him about some difficulty he was having with a water well at the laundry in the fall of 1929 or in the spring of 1930; that Boone intelligently explained to him the trouble he was having with said well and what he had been advised to do by others. Witness testified that Boone's acts and conduct during all of this time were intelligent and that, in his opinion,

Boone was capable of transacting ordinary business matters the last time he had any transactions with him, which was in the fall of 1929 or in the spring of 1930. (App. p. 232).

THOMAS A. WICKHAM was a member of the board of directors, vice-president of the Bank of Raleigh, and director of the Daniel Boone Mining Machine Company. He knew Boone since 1920, talked to him frequently, both before and after Boone's property was sold. Boone discussed current issues intelligently and witness saw nothing wrong with him.

Said bank loaned Boone large sums of money and had notice of no alleged mental infirmity of Boone. (App. p. 328).

SAMUEL E. TURNER, a retired merchant, was a member of the advisory committee of the city of Beckley. Boone, as a member of said committee, looked over the streets proposed to be built and improved, examined the specifications and estimates of cost made by the engineer. Boone attended the meetings of said Committee regularly and was an active member. Witness saw nothing wrong with Boone until a short time before he was taken away. (App. p. 331).

W. E. JAMES, secretary of the chamber of commerce of Beckley for eighteen years. He knew Boone from the time he came to Beckley. Boone was an active member of said chamber 1924-1925. Witness discussed with Boone the needs of the city and business matters in general. He also saw and talked with Boone frequently after he was a member of said board and was of the opinion Boone was competent to transact business until a short time before June, 1933. (App. p. 338).

CHARLES FARMER was an employee of the Beckley Water Company. Witness stated he saw Boone in the Water Company's office, on the streets and at church every few days and talked with him about various matters, and that his conversations were always intelligent, and that he saw nothing wrong with Boone until about June, 1932. (App. p. 376).

JACKSON SMITH lived on the same street with Boone in Beckley; was county clerk of Raleigh County and knew Boone all the time he was in Beckley. Witness saw Boone frequently as he passed the latter's residence going to work. Boone came in the clerk's office, examined the records and talked to him about the same. He last saw and talked to Boone about a year before he was sent away and saw nothing wrong with him at that time, and was of the opinion that Boone was mentally able to transact business the last time he saw him. (App. p. 238).

E. S. PUGH, president of the Raleigh Smokeless Fuel Company for the past three years; knew Boone in a general way for several years and served with him as a member of the city council. Boone was an active member of said council and intelligently took part in the discussions, and the members of the council carefully considered his ideas. Witness saw Boone after he served on the council but not so frequently. He remembers seeing him on one occasion at the Beckley Hotel, less than a year before he was sent away to the asylum and his ideas were not clear at that time. On other occasions prior thereto he considered Boone competent. (App. p. 241).

D. C. WADE, assistant cashier of the Raleigh County Bank since 1920. Boone and his wife, Tola A. Boone, borrowed $2,000.00 from said bank on March 6, 1923, and the note was renewed and paid on February 10, 1927. They, again, borrowed $1,000.00 on March 8, 1929 and it was paid July 16, 1929. Witness cashed checks for Boone and had other business dealings with him up until about 1930, and considered him mentally competent to transact business until about a year before he was sent to the asylum. (App. p. 250).

ROBERT M. FRENCH, cashier of the Bank of Raleigh, lived about three hundred yards from Boone, and was well acquainted with him and had business contacts with him, had conversations with him and was of the opinion that Boone was men-

tally capable of understanding business transactions until a long time after the creditors' suit against Boone. (App. p. 255).

FRANCIS CONRAD, was a director of the Beckley National Bank about 1925 and 1926 and knew Boone until he went away in 1933. The witness considered Boone very competent. Saw him occasionally after the witness' service ceased on the board of directors. Never saw anything wrong with Boone at any time. (App. p. 261).

D. W. BOONE. This witness had been in the coal business all of his life with his brothers, J. D. Boone, J. A. Boone and Francis Boone. Each owned a one-fourth undivided interest in said business. Some of the companies in which they were interested became involved in debt about 1918 and 1919 and went into bankruptcy in 1928 and 1929. Notes which were endorsed by J. A. Boone and the other brothers were given to a number of wholesale firms for past due accounts. In 1928 or 1929 the American Export Corporation was organized by the witness, J. A. Boone and other brothers to pool the Boone holdings and sell or borrow money so as to pay the indebtedness. J. A. Boone was vice-president of said company and discussed these matters with his brothers. Their joint properties were offered for sale for about two million dollars, but without success. An effort was then made to borrow money and this also failed. Soon thereafter creditors' suits were instituted. J. A. Boone remained interested in said companies after he went to Beckley. Witness freqeuntly visited J. A. Boone in Beckley and the latter showed him over the laundry. Witness frequently talked to his brother about their joint business matters and also talked with him about general business and never noticed anything mentally wrong with him until twelve or eighteen months after his foot was injured in August, 1930. (App. p. 442 and 523).

JOHN G. ALLPORT was called as a witness for petitioners and testified he had known Boone forty years and worked for

him many years. Counsel for petitioners asked him if, in his opinion, Boone was competent to handle an ordinary business transaction in the year 1926 and subsequently, he replied: "I don't see any reason why he could not have, just the same as he had always; he may not have handled it as well, but I couldn't say just offhand because a man didn't seem to know me every time he met me that he couldn't do things." (App. p. 114).

SILAS GORE drilled a water well at the laundry in 1927 for Boone. The installation required about two months and Boone was there almost every day. In the summer of 1930 witness went back and made some changes in this well at Boone's request. Boone was competent at this time and witness saw nothing wrong with him until about eighteen months after 1930. (App. p. 293).

J. C. MEADOR was assistant cashier of the Beckley National Bank from 1922 to 1928 and was associated with Boone on the board of directors of said bank. He saw and usually transacted business with Boone at the bank two or three times a week. Witness considered Boone able to transact business during all the time he was assistant cashier. (App. p. 475-476).

DANIEL BOONE, a brother of J. A. Boone, lived in Beckley from 1920 to 1931. He testified that J. A. Boone was president of the Boone Smokeless Coal Company and vice-president of the Daniel Boone Mining Machine Company, that J. A. Boone negotiated a contract with the Covington Machine Company for the sale of mining machines in February, 1927, that J. A. Boone would come to the witness' office about every day and witness would go to Boone's office about twice a week and that they often discussed the laundry business and other business. It was about 1932 when witness first noticed any indications of abnormality in his brother and prior to that time he was normal. (App. p. 478-487).

JAMES D. BOONE was also a brother of J. A. Boone. Witness helped his said brother organize the American Export Corporation about 1929. J. A. Boone was vice-president of said company and was familiar with its operations. Witness was also interested with his said brother in many other corporations in which J. A. Boone was active until sometime after 1930. Witness did not notice anything mentally wrong with his brother until 1931 or later. (App. p. 559).

LAUNDRY EMPLOYEES

JEANETTE HARLESS was an employee continuously at the laundry from 1926 to 1930. She took care of the laundry tickets and helped to make the payroll for about one hundred employees. Boone helped her count the money and on Friday when the payroll was made up, he took the payroll to the bank and brought the money back, counted it and helped to put it in the envelopes and distributed it to the employees. Boone made up the payroll and witness checked the same and Boone seldom made a mistake. Boone came to the office early every morning and was usually there when the employees came to the office. Boone was always interested in the affairs of the laundry and was mentally capable to look after the business and witness never saw anything which indicated that Boone was mentally incompetent. (App. p. 187).

A. F. BRYSON, a former Justice of the Peace, and served one term as a member of the board of education and was an employee of the laundry from August, 1928 to April, 1929 as route foreman; witness had business conversations with Boone about every day, collected the money and turned it over to Boone about every day except Saturdays. Witness saw Boone for about a year after he left the employment of the laundry in April, 1929. Witness was of opinion that Boone was capable of transacting business until sometime in the latter part of 1930 and saw nothing wrong with him until after that time. (App. p. 214).

H. J. THORN audited the books of the laundry company once or twice a year during the entire period that Boone was manager (1923-1931) and made up its income tax returns and consulted Boone about the proposed changes in the bookkeeping system and the amount of taxes that had to be paid. Witness was of the opinion that Boone was able to understand an ordinary business transaction in 1931 or 1932. (App. p. 265).

ELSIE KNAPP worked for the laundry as office clerk from 1926 until January 8, 1931. She answered the telephone and sometimes made up the payrolls. Witness frequently saw and talked with Boone. Boone counted the money and deposited it in the bank and witness seldom found an error. Boone went to the bank and got the money for the payroll once a week, until the laundry was sold January 8, 1931. Witness did not see any signs of mental incompetency on the part of Boone. (App. p. 284-287).

CLYDE COOK was bookkeeper for the Raleigh Steam Laundry for 1923 and 1924, or 1924 and 1925. He saw Boone practically every day and talked to him about the laundry business. Boone came to the laundry early about every morning, signed all of the checks and checked the invoices with the books, and ran the laundry business in a businesslike manner. Witness did not see anything wrong with Boone until after the year 1930. (App. p. 305).

JOHN O'DELL worked at the laundry from 1923 until January, 1931 with an intermission of about one year in 1925. Witness was route man, whose duty it was to solicit, deliver and collect laundry. He talked with Boone every few days, and never saw anything mentally wrong with him until about 1932 when witness noticed a change in Boone's mental condition. (App. p. 504).

C. C. WETZEL worked at the laundry from 1924 to 1930 inclusive. Saw Boone every day, had conversations with him about once a week. Boone assisted in making up the payroll,

talked with Boone on occasions when he passed through the laundry. Witness never saw anything wrong with Boone's mind. (App. p. 550).

H. C. BARNETT was assistant general manager from 1922 to 1929. He was in charge of production and employees and had frequent contact with Boone during this time in regard to purchasing machinery, trucks, supplies, etc.; Boone superintended buying of other materials and looked after the collection and disbursements, and checked over the time cards. Boone came to the office early every morning and stayed about five hours and then came back in the afternoon and stayed about three hours. Witness was of the opinion that Boone was competent to transact business during all the time he was at the laundry. (App. p. 150).

DEWEY PORTERFIELD, branch manager for the Charleston Laundry for seven years, worked for J. A. Boone at the Raleigh Steam Laundry for nine years, beginning in 1924; he was assistant superintendent and later superintendent. Witness talked with Boone every day about the affairs of the laundry, and he visited Boone in his home after he was hurt in an automobile accident. Never saw anything that indicated mental weakness of Boone. (App. p. 398).

LAY WITNESSES

J. S. ELLISON was on the police force at Beckley at different times. He never noticed any change in Boone's mental condition until 1932. He never had any business transactions with Boone, but visited him at the laundry and Boone showed him through the plant and talked to him about the laundry business. He talked to Boone in 1930 and 1931 and Boone was then able to carry on a connected conversation and observed no mental weakness in him. (App. p. 392).

J. H. POTEET was a real estate man and lived in Beckley since 1901. He knew J. A. Boone since he moved to Beckley

and for a long time prior thereto. Boone used to come to witness' office about the time the latter was hurt in August, 1930 and talked with him on many occasions. Witness saw Boone on the street and talked with him and he never saw anything mentally wrong with him at any time. (App. 218).

W. L. JEFFRIES operated a shoe shining parlor in Beckley. Boone frequently came to his place to get a shoe shine and witness talked with him sometimes for thirty minutes and sometimes as long as an hour. Witness remembered that these conversations were when Boone had his foot injured and was walking on crutches. Witness stated Boone was perfectly sane. (App. p. 298).

EARL A. HALL owned and operated a music store in Beckley. He knew J. A. Boone and discussed matters of business with him about once a month, as long as Boone remained in Beckley. Boone visited his place of business and they talked together. On one occasion Boone came into his store on crutches and he talked with him. Witness stated that he saw nothing in Boone's conversation, demeanor or attitude that indicated he was mentally unsound or unfit to transact business at any time. (App. p. 288).

C. A. BYUS lived in Beckley since 1922, and knew J. A. Boone since that time. Talked with Boone and saw nothing wrong with him until possibly a year before he was sent away. (App. p. 325).

H. A. COTTRELL, a bookkeeper, lived at Fayetteville and worked at one time for James D. Boone Coal Company and other interests of the Boones, from December, 1927 until January, 1930. J. A. Boone was frequently in the office and he talked with him and heard him and his brother talk over business matters and social conversations. He was present at the meetings of the board of directors of American Export Corporation and heard J. A. Boone and others discussing the affairs of the Company in 1929 and 1930. He neither saw nor heard

anything in Boone's demeanor and conversation to indicate that he was otherwise than normal and witness was of the opinion that Boone was capable at that time of understanding ordinary business transactions. (App. p. 495).

JOHN B. AICKEN, a witness for the petitioners, said Boone was forgetful, walked in the streets, stood around gazing, and mouth partly opened. This same witness further testified that Boone gave a great deal of personal attention to the laundry, was at the plant early in the morning every day; that he superintended the operating expense, particularly the payroll; that he raised finances to carry on the laundry; that he went over the payroll each week; kept close contact with expenses; that he consulted Boone on the management of the laundry and considered his advice good and followed it. (App. p. 115-116).

The documentary evidence mentioned under the heading "Business Activities," supra, showed that Boone carried on business through the years 1929-1930, and 1931 as a normal man and removes all doubt of his mental competency during that time. The pathology of senile dementia is such that there are no remissions in the degenerative process. Once a person becomes mentally incompetent as the result thereof, he never again becomes competent. Florence Matthews, a colored house maid, stated that J. A. Boone in 1920 said his son had ridden a pony to death and had not given it anything to eat, when it was outside in the pasture unharmed and in sight of Boone; that in 1922 Boone went on a rage and accused her falsely of breaking the dishes; that in 1923 he falsely complained that the chickens were being starved to death and later stated that they had been stolen; that in 1924 Boone falsely complained about a man beating the rugs and tearing them to pieces; that in 1926 Boone stated that his boys and their playmates were stealing his glass jars from the basement of his house; that in 1928 Boone did not know the maiden name of his wife, did not recognize her, his sons and his near relatives when in their presence.

Beulah Carter, another colored maid who worked for Boone from 1928 to 1930, testified that Boone complained two or three times a week of a very severe headache; that Boone frequently passed his two sons on the porch without recognizing them; that he stayed around the house nearly all the time and never went to the laundry while she was in the Boone home. (App. p. 114).

H. A. Moseley, a brother-in-law, testified that he met Boone on the street in Beckley in 1927 and that Boone did not recognize him. (App. p. 143-144).

It is, indeed, strange that such peculiar things occurred only in the home. If this conduct was due to Boone's mental condition, why was it that such characteristics did not manifest themselves at some other time and place? If Boone was ailing and suffering as these witnesses testified, why was it that his wife and members of his family did not consult a physician and have Boone treated? This testimony is inconsistent with Tola A. Boone's borrowing money in 1929 on the strength of her husband's credit; inconsistent with her acquiescence and approval of the manner in which Boone's attorneys defended his interests in all the legal proceedings culminating in the sale of his property; inconsistent with the testimony given by her and the members of the Boone family and near relatives before the Lunacy Board in March, 1933 when no law suit was pending; inconsistent with the claim of Tola A. Boone for dower and as beneficiary under her husband's will; and inconsistent with the family's holding out Boone through the years as competent to do business while his properties were being sold through Court proceedings and conveyed to innocent purchasers.

Eight of petitioners' witnesses testified that in their opinion J. A. Boone was mentally incompetent subsequent to January, 1931. This testimony should have but little weight because of the time to which it relates.

Several of petitioner's witnesses testified to a change in Boone's character. There is a normal process of change in old age. The evidence does not show that the character change in Boone, whatever it may have been, was accelerated beyond the change that occurs in a man of his age. Five witnesses for the petitioners testified that Boone's mind was all right at times and at other times bad. This was an effort on the part of the witnesses to reconcile Boone's intelligent business activities, as shown by the documentary evidence, with his alleged delusions and eccentricities. This testimony is in direct conflict with the medical evidence. The Judge of the District Court was in doubt when Boone became mentally incompetent and stated in his written opinion:

> "There is some doubt as to whether he became incompetent at the beginning of 1929 or later in that year." (App. p. 44).

Dr. R. G. Blackwelder, speaking with reference to the variance in the testimony of the witnesses for the respondents and the petitioners, said:

> "The two sets of facts are irreconcilable." (App. p. 620-621).

Dr. H. O. Van Tromp stated that if Boone intelligently transacted business from April 4, 1927, including 1929, that he was competent to understand an ordinary business transaction. (App. p. 147).

Dr. Edward F. Reaser, petitioners' expert witness, testified that if Boone could carry on a business transaction intelligently, involving details, over a period of one or two years, then his assumption as to the time when Boone became mentally incompetent and as to the extent of such incompetency was "all wrong." (App. p. 148-149).

The Judge of the District Court in his opinion, stated:

> "Defendants introduced some evidence that Boone showed no signs of mental weakness until about a year before he was sent to Weston. However, that

consisted almost entirely of negative opinion evidence. There is very little evidence of any activities on Boone's part in the line of business after 1928 or 1929." (App. p. 43).

We desire to refute this statement from the record at the risk of some repetition.

In 1929 J. A. Boone employed the law firm of File, Goldsmith & Scherer, to represent him in a creditors' suit pending in Raleigh County, West Virginia. In this year he had numerous conferences with the different members of this firm and gave them accurate information concerning this litigation and his business matters in general. Boone's attorneys prepared his answers and pleadings in said suit from information obtained from him.

In 1929 Boone leased four tenement houses, collected the rent, paid the taxes and looked after the repairs.

In August, 1929, J. A. Boone, in company with his attorney, W. H. File, went from Beckley to Fayetteville, W. Va., and negotiated a settlement pertaining to the New River Land Company's property, and Boone executed a contract dated August 1st, 1929 under the terms of which Boone's stock in said Company, which had been formerly carried in his name, was transferred at his request to his wife, because Boone was then aware of his financial condition.

In March, 1929, Boone discussed with James K. Thomas his financial condition and the notes owed by the New River Export Coal Company, endorsed by Boone and his brothers.

March 8, 1929, J. A. Boone went with Tola A. Boone to the Raleigh County Bank and there endorsed her note for $1,000.00 payable to said Bank.

In 1929, J. A. Boone and his brothers organized the American Export Corporation, to take over the properties of the Boone brothers and their corporations, consisting of several thousand acres of land, with the hope of selling the same and

paying their debts. In that year he gave information to the attorneys from which the proper legal papers were drawn for the organization of said corporation, and executed said papers.

June 11, 1929, J. A. Boone and two of his brothers instituted a general creditors' suit against the New River Export Smokeless Coal Company and a decree was entered in said suit October 28, 1929, referring the cause to a commissioner in chancery. May 14, 1929, at the instance of Boone and others, a decree was entered, enjoining and restraining the creditors of New River Export Smokeless Coal Company from making levies and sales under executions.

February 13, 1929, the State of West Virginia, by E. W. Becker, its School Land Commissioner, instituted a suit in chancery against J. A. Boone and others for the purpose of selling some of Boone's real estate, on the ground that the title to the same had been forfeited for the non-payment of taxes. Boone filed his answer February 14, 1929.

In 1929, Boone instituted an action for the Raleigh Steam Laundry Company against the National Surety Company and gave the attorneys representing the plaintiff accurate information concerning this litigation.

In 1929 J. A. Boone and Daniel Boone instituted a suit against the Sun Coal Company, in which action J. A. Boone testified.

In May, 1929, Boone borrowed money from Ashton File and paid him in August of that year the correct amount without being reminded.

In 1929, Boone renewed notes aggregating several thousand dollars and paid the interest.

In 1929, Boone acknowledged ten agreements and deeds before Thomas Boone, a Notary Public and a nephew of Boone, the last of which was dated November 15, 1929.

In 1929, Boone correctly collected royalties for the Brown Coal Company from the Stover Coal Company and gave proper receipts.

In 1929, Boone was the active Manager of the Raleigh Steam Laundry, which employed approximately one hundred persons and correctly took care of its finances, receipts and disbursements.

In 1929, Boone personally made eighty-two deposits in the Beckley National Bank, aggregating $20,451.96, and wrote five hundred forty-six checks withdrawing $21,412.41, and made no mistakes.

November 15, 1929, Boone was appointed, by written power of attorney, to collect and disburse royalties received from Eli Smokeless Coal Company, which he did correctly and satisfactorily.

In 1929, Boone was an active member of the board of directors of the Beckley National Bank and attended the meetings of the board and took part in the matters of business coming before it.

In 1929, Boone carried on correspondence with the law firm of File, Goldsmith & Scherer, relative to some accounts receivable of the Raleigh Steam Laundry, which he had placed in their hands for collection.

In 1929, Boone collected $375.00 per month rent from the Northwestern Provision Company on the "Morris Building" and correctly accounted to P. M. Snyder for one-half of the same, paid the taxes and other items of expense on said building and carried on an intelligent correspondence with P. M. Snyder relative thereto.

In 1930, Boone was the active General Manager of the Raleigh Steam Laundry attending to many of its financial affairs and looked carefully after its business in general.

In 1930, Boone personally made sixty deposits in the Beckley National Bank, aggregating $6,842.86, and wrote four hundred and two checks withdrawing $7,694.43, without making any mistake.

In 1930, Boone was a director in the Beckley National Bank until April 4th of that year.

In 1930, he was still active in the creditors' suit which he and his brothers had instituted in 1929 against the New River Export Coal Company.

In November, 1930, Boone testified as a witness before W. A. Thornhill, commissioner in chancery, in the Raleigh County general creditors' suit against him. In 1930, Boone was still active in said creditors' suit and had many conferences with his attorneys.

In 1930, Boone conferred with Walter J. Campbell, C. E., in regard to some difficulties he was having at the Raleigh Steam Laundry about water, and Boone intelligently discussed this matter with him.

In 1930, Boone contracted with Silas Gore to drill a deep water well for the use of said laundry, which work Boone personally looked after for the laundry.

In 1930, Boone frequently conferred with H. J. Thorn, Auditor, about the books and records of the Raleigh Steam Laundry and showed himself conversant and familiar with the same.

In 1930, D. W. Boone, W. Francis Boone and J. D. Boone frequently consulted J. A. Boone about their financial difficulties.

Until January 8, 1931, Boone remained in charge of the Raleigh Steam Laundry. On that date Boone showed W. T. Blakely through the laundry, explained its operation and discussed the problems of the laundry business and showed himself familiar with that business.

In 1931, Boone personally made one deposit in the Beckley National Bank of $252.50 and wrote fifteen checks aggregating $341.35, making no mistakes.

June 3, 1931, Boone executed an affidavit before Francis M. Biggs, concerning the sale of Boone Coal Company property, which occurred in 1920.

December 15, 1931, Boone testified as a witness in a federal income tax hearing before the Honorable Edgar J. Goodrich, member of the United States Board of Tax Appeals.

In 1931, Boone was still an active director of several of the corporations in which he and his brothers were interested.

In 1931, he instituted an action of trespass on the case against H. A. Moseley, to recover damages for an injury to his foot. He employed the law firm of England & Ritchie, of Charleston, West Virginia, and gave them accurate information from which to prepare the pleadings.

In 1931, he was still active in the general creditors' suit against him, and frequently discussed this litigation with his attorneys, File, Goldsmith & Scherer.

In 1931, Boone discussed his business affairs with C. E. Mahan, one of his attorneys, and showed himself familiar with his business.

February 4 ,1932, he testified as a witness in the suit brought against H. A. Moseley in 1931. Charles Ritchie, the attorney who conducted the case for him, testified that Boone gave a fairly accurate account of the matters connected with said litigation. Neither the Judge who tried the case, the court reporter, the lawyers, the witnesses, nor any of the parties were called to testify that Boone acted peculiarly in the trial of this case or did anything which indicated that he was mentally incompetent.

Tola A. Boone and Walter Boone, a nephew of J. A. Boone, testified before the Lunacy Commission, March 14, 1933, and stated that indications of Boone's insanity first appeared about one year prior to said date or in March, 1932.

This evidence concerning Boone's business activities subsequent to January 1, 1929 is uncontroverted and successfully refutes the statement of the trial judge that Boone did little business in 1929. There were few men more active in that year than he. For the weight to be given such evidence, see:

23 C. J., p. 47, Sec. 1791, and cases cited;
20 AM. JUR. 1030, Sec. 1180, and cases cited.

Another significant fact is that there were many attorneys who appeared in the creditors' suit against Boone, representing clients who were seeking to collect their judgments, if possible. Judgment liens totalling over Two Hundred Thousand Dollars ($200,000.00) were not reached in the distribution of the assets. If any of these attorneys and creditors had noticed any conduct of Boone indicating mental incompetency, or even suspicioned any such thing, they would have forthwith attacked said judgments and had them set aside in order that they might share pro rata with all of Boone's creditors in the distribution of the proceeds from the sale of his property. Instead, they voluntarily released their judgment liens in order that they might be relieved of vexatious litigation when there was no chance to collect anything.

The respondents used seventy-five witnesses, all of whom were of the highest character, and most of whom had more than average intelligence, such as doctors, lawyers, bankers, members of the city council of Beckley, members of the board of directors of the Beckley National Bank and other banks, civil engineers, merchants, contractors, county clerk, deputy circuit clerk, and others. The testimony of such disinterested, intelligent, observant and unprejudiced witnesses, supplemented by the various business transactions of Boone in 1929 and subsequent, shown by the great volume of documentary evidence,

makes the petitioners' evidence speculative and conjectural. When the whole evidence is given a fair and logical consideration, one is led irresistably to the conclusion that J. A. Boone was mentally competent until at least sometime in the spring of 1932.

(2) *J. A BOONE IN 1929 POSSESSED THE QUANTUM OF MENTAL CAPACITY NECESSARY UNDER THE LAW OF WEST VIRGINIA FOR LEGAL RESPONSIBILITY.*

In *Hale* v. *Cole*, 31 W. Va. 576, the grantor in the deed was a feeble old woman, who disinherited her only child in favor of two nephews, and who was shown to have been a very eccentric character. She appeared on the street in her night clothes, would kick the furniture about in the house and disturb the quiet by yelling. The Circuit Court set aside the deed on the ground that the grantor did not have sufficient mental capacity to make a deed. The Supreme Court reversed the Circuit Court and sustained the deed and held that the grantor did have sufficient mental capacity to make a deed.

In *Buckey* v. *Buckey*, 38 W. Va. 168, 18 S. E. 383, the plaintiff brought three suits in equity to annul three deeds on the ground of the incapacity of the grantor from old age to make a deed. The three suits were consolidated and heard as one. One deed was made when the grantor was eighty-four years old, and the other two when he was eighty-seven. The evidence as to his mental capacity at the time of the execution of the deeds was conflicting. There was testimony that he did and said many eccentric things, to-wit: He stated he was in Washington, D. C., and saw Guiteau and President Garfield; that Garfield was a bad looking man. He was not in Washington and Garfield, of course, was dead. On another occasion he was standing on a bridge over Valley River and asked where the bridge was. He was informed that the old bridge had been burned and that he was standing on the new bridge.

He then remarked that he might find the old bridge and went in search of it. He was also found sweeping out an old stable in which he said he was going to put his horses, although it was disused and roofless and a new one built nearby. He was found wandering listlessly through the streets and through the fields and when some members of his family tried to get him to go home he became very angry. He was found cutting weeds on the opposite side of the street from his home, seemingly unaware of where he was, and when his attention was called to it, he returned across the street. There was a colored woman living in his home. He sometimes told her goodbye, saying he was going to Frederick City, and then he would go to the tanyard and return. At times he talked incoherently and would tell the colored woman when it was raining to take the doors from the out-houses for fear that they would get wet. At times he failed to recognize his old acquaintances and when told who they were, he seemed to recall them. The Circuit Court annulled the deeds, holding that the grantor was mentally incapable of making the same. Notwithstanding this very strange and eccentric conduct and talk of Buckey, the Supreme Court upheld his three deeds and reversed the Circuit Court insofar as it annulled said deeds.

In *Stump, et al.* v. *Sturm, et al.*, 254 Fed. Rep. 535, tried in the District Court of United States for the Northern District of West Virginia, the plaintiff sought to set aside a certain deed from Daniel Huffman to the Baptist Home Mission Society, dated March 11, 1907, a certain deed from said Huffman to John S. Stump, dated September 20, 1909, and certain other deeds, on the ground of mental incapacity of the grantor and undue influence exercised upon him by the grantees. In November, 1910, the County Court of Gilmer County adjudged Huffman incompetent and appointed a committee to control his estate. He died March, 1916, at the age of ninety-four. He was, therefore, eighty-five and eighty-seven years of age at the time he made the aforesaid deeds. The District

Court held said deeds invalid and set them aside. The Circuit Court of Appeals, October 1, 1918, reversed the District Court and held that it was in error in holding that the deeds in question were invalid.

In this case the court on p. 547 announced and approved the rule in the case of *Buckey* v. *Buckey, supra,* and reaffirmed a number of cases in West Virginia as follows: *Delaplain* v. *Grubb,* 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788; *Farnsworth* v. *Noffsinger,* 46 W. Va. 410, 33 S. E. 246; *Teter* v. *Teter,* 59 W. Va. 449, 53 S. E. 779; *Bade* v. *Feay,* 63 W. Va. 166, 61 S. E. 348; *Woodville* v. *Woodville,* 63 W. Va. 286, 60 S. E. 140; *Black* v. *Post,* 67 W. Va. 253, 67 S. E. 1072; *Barnett* v. *Greathouse,* 77 W. Va. 514, 88 S. E. 1013.

In *Delaplain* v. *Grubb,* 44 W. Va. 612, the grantor in a deed was shown to have been eccentric to the verge of insanity. He imagined himself to be exceedingly poor, although he was wealthy. He was continually in fear that the sheriff would put him and his family out of his home. He failed to recognize his best friends at times. On the day before his death he walked into a room without his outer clothing and asked if he was not in a certain street in a city. On another occasion he failed to recognize his daughter-in-law. There was a decree for the defendant and the plaintiff appealed. The decree was affirmed.

In *Woody* v. *Taylor,* 114 Va. 337, the testator was described in the evidence as old, feeble and childish, that his memory was not good; that he would forget sometimes that he had read a letter and would want to read it again; that he always wanted his own way; that he would use rags for handkerchiefs; that on one occasion he came to the breakfast table with only his underclothes and a linen duster on; that on another occasion he was on the street similarly clothed; that he wore his clothes in a rusty, dilapidated condition.

In this case the court held, in spite of the many eccentricities, that the testator had sufficient mental capacity to make a will.

In the case of *Martin* v. *Thayer,* 37 W. Va. 38, David Finley, on the 21st day of November, 1887, executed his last will and died eight days later, on the 29th day of November, 1887, at the age of eighty-two years. At the time of the execution of said paper the testator was under the impression that a paper he had executed on the 21st day of May, 1884, as and for his last will and testament, had been abstracted from a certain trunk or box in which he usually kept his valuable papers. He assigned as a reason why he wished to execute the will of November 21, 1887, that he suspected his granddaughter, Lizzie Martin, who resided with him, as having destroyed the former will. Subsequent to his death the will of May 21, 1884, was found by his executors. In October, 1891, a bill was filed in the Circuit Court of Wood County by the plaintiffs and against the defendants as executors of the estate of the said David Finley to set aside the will dated November 21, 1887, on the ground that the testator at that time when he made said last will was afflicted with Bright's disease and was extremely ill and was not only exhausted physically, but his mind was greatly enfeebled to such an extent that he was not competent to make a will, and that said will was induced and procured by undue influence. These allegations of the bill were denied and the question whether or not the paper dated November 21, 1887, was the last will of the said testator was submitted to a jury, and it returned a verdict finding that the said paper writing was not the will of the said testator because he was mentally incapable of making said will. The defendants moved the Court to set aside the verdict on the ground that the plaintiff's evidence did not show that the testator was incapable of making a will on November 21, 1887, which motion was sustained and said verdict was set aside and a new trial was granted. From this judgment the plaintiffs appealed. The Appellate Court held that the Court below was warranted

in setting aside said verdict and the judgment granting a new trial was affirmed.

Bowdoin College, et al. v. *Merritt,* 75 Fed. Rep. 480, was a suit in equity to quiet title to certain real estate. One of the questions for decision was whether the grantor had mental capacity to make the conveyances complained about. At the time of the execution of the deed, the grantor was seventy-six years old. She had the feebleness natural to age. Members of her household and intimate friends testified that her memory was very weak and that her mind was not strong; that she was forgetful; that, at times, she did not seem to have any strength of will or body; that she was almost continually taking medicines. The instances of her weak memory and mind and her forgetfulness were stated to be that she could not carry on a conversation for any length of time on the same subject; that she would ask the same questions over and over; that she would order things and then forget what she had ordered; that she did not always recognize her friends; that she would purchase produce at the markets, pay for the same, and, after a short time, would go back and offer to pay again; that she would tell some little incident that happened in her younger days and in a little while, she would tell it over again, even the third time, perhaps, within an hour or hour and a half; that she did not know and could not state the names, ages and residences of her collateral relations. The court upheld the grantor's deed in this suit.

The suit of *Woodville* v. *Woodville,* 63 W. Va. 286, called into question the validity of a deed made by James L. Woodville to his son, Cary Breckinridge Woodville, on April 10, 1902. The grantor was a man eighty-two years old. The deed was attacked on the ground of the mental incapacity of the grantor to make it. We quote from the opinion (p. 291) as follows:

> "There is much opinion pro and con in the record upon this question. But the defined weight of the testi-

mony is that he was not only of sufficient mental capacity to do so, but of strong mental vigor, and lively mental activity, for one of his age. It is not denied that he was always a man of strong will and mind, knowing his own mind, and not being easily persuaded from his convictions. And right in this connection there is a significant admission in one of the briefs of counsel for plaintiff. It is a frank statement, disclosing that upon this question of mental weakness even counsel for plaintiff is shaken by the preponderance of the proof. It is there said: 'While the plaintiff is frank to admit that he did not show that Dr. Woodville was at all times, from the autumn of 1901, to April, 1902, incapable of making a deed or will, he did show that the mental powers of Dr. Woodville were noticeably failing.' We concur in this, and say that at the most, it is all that plaintiff has shown. But failing mental powers are not alone sufficient to invalidate the deed. As said by this court in Buckey v. Buckey, supra: 'A grantor in a deed may be extremely old, his understanding, memory and mind enfeebled and weakened by age, and his action occasionally strange and eccentric, and he may not be able to transact many affairs of life; yet, if his age has not rendered him imbecile, so that he does not know the nature and effect of the deed, this does not invalidate the deed. If he be capable, at the time, to know the nature, character and effect of the particular act, that is sufficient to sustain it.' While there is some suggestion in the testimony of strange and eccentric acts in piling rocks on the farm, and loss of memory at times, yet above and beyond this is the clear draft of the will, his clear transactions of many business matters with many different persons at and near the time of the execution of this deed, and, in fact, up until within a short time before his death, in August 1904. The evidence speaks out clearly that old age had by no means rendered him imbecile. We find him at the period of the few months surrounding the execution of the will and deed writing the clearest and most sensible letters, transacting business with tenants, evidencing a perfect knowledge at all times of what was going on in relation to his affairs,

> calculating and paying out money, to say nothing of the clear and firm mind disclosed by the terms, phraseology and diction of the will, written in his own hand, and the transactions in relation to the execution of the deed, the character of which, and what he desired in that regard, he related to his attorney, and, after a few days, sent a written memorandum, to be followed in the preparation of the deed, embracing the same details."

The suit of *Burkle* v. *Abraham*, 112 W. Va. 257, was brought November 1, 1929, to set aside a deed dated, June 27, 1927, on the ground that the grantor was mentally incompetent to execute the same. The testimony of witnesses for the plaintiff was to the effect that the grantor was, in their opinion, mentally unfit to transact business during the last week of June, 1927. Their opinion was predicated upon the grantor's mental and physical deterioration from old age, her failure to recognize her acquaintances and intimate friends. Some witnesses testified that she would stand and stare and fail to answer questions or to realize that she was at her home. One witness testified that for three weeks next preceding the execution of the deed, that the grantor did not recognize her acquaintances; that she was subject to crying spells; that she would go to the front door of the house dressed in her night clothes. The records show that the grantor died July 14, 1927, at the age of eighty years and after an illness of five or six weeks. One witness testified that during the last three weeks of her life, that she had failed to recognize her acquaintances and could not talk coherently. The Supreme Court reversed the judgment of the Circuit Court, dismissed the bill and upheld the deed.

The suit of *Teter* v. *Teter*, 59 W. Va. 449, was instituted for the cancellation of the two deeds on the ground of mental weakness and incompetency on the part of the grantor and undue influence exerted upon him in obtaining the execution of the deeds. The deeds were dated May 1 and May 13,

1901. Among the specific instances of alleged insane conduct on the part of the grantor are the following:

(a) One witness testified that in the year 1898, the grantor came to his place riding a horse without either bridle or saddle, and was unable to dismount in the usual way, but he rolled off on a platform and laid there, seemingly unconscious, for several hours.

(b) A son of the grantor testified that his father rode through the river on horseback when it was so high as to make it dangerous, and that it was such a rash act that his father would not have done it had his mind been normal. He further stated that his father failed to recognize him in May, 1901.

In the opinion, the Court says, (p. 456):

> "The first inquiry is whether the legal presumption of sanity and mental competency of the grantor has been overcome by the evidence adduced for that purpose. That old age and sickness are not of themselves sufficient has been repeatedly decided by this court. Buckey v. Buckey, 38 W. Va. 168; Delaplain v. Grubb, 44 W. Va. 612; Eakin v. Hawkins, 52 W. Va. 124. Nor is mental distress sufficient. Farnsworth v. Noffsinger, 46 W. Va. 410. The witnesses seem to have been unanimous in the opinion that the once strong mental vigor of the grantor had been impaired and broken by his affliction. All seem to admit that from the date of the first attack his mind was never as strong as it had formerly been, and that his powers of mental concentration and adherence had been weakened to an extent that was noticeable. How far this impression was due to the impediment of speech from which he suffered, as a result of his physical ailment, it would be difficult to tell, but it would be fair and reasonable to say that his peculiarity of expression, no doubt, in some instances, was attributed to mental weakness. Conceding that the evidence established feebleness and weakness of the intellect, these qualities are insufficient to prove incompetency to execute a deed . . . That this is an unsatisfactory kind of evidence has been repeatedly declared by this Court, as well as by other courts."

Id. p. 459:

> "Our conclusion, from the whole evidence, is, that it establishes nothing more than feebleness and weakness of mind, and fails to make out a case of absolute mental incapacity. According full credibility to all the witnesses, it appears that there were, notwithstanding the weakened condition of mind, lucid intervals during which there was sufficient capacity to appreciate and understand the subject matter of a business transaction, and that the two deeds in question were executed at such times."

The suit of *Barnett* v. *Greathouse*, 77 W. Va. 514, was instituted for the purpose of cancelling a deed, dated January 2, 1912, on the ground of mental incapacity of the grantor and fraud and undue influence by the grantees. There was a great volume of testimony introduced by both plaintiffs and defendants, and the evidence was conflicting. The doctor testified that he treated the grantor principally for hemiplegia, but found him suffering from arteriosclerosis, high blood pressure and senile dementia. He stated that, in his opinion, the grantor was not capable of tending to business affairs and was, on account of his condition, easily influenced. Non-expert witnesses testified that, in their opinion, the grantor was incapable of making a deed, and based their opinion upon his failure at times to recall the names of persons with whom he had been well acquainted, forgetfulness, etc. The Court held that the evidence showed that the grantor had sufficient mental capacity to make a deed and upheld the same.

Bade v. *Feay, et al.*, 63 W. Va. 166, was a chancery suit, instituted in the Circuit Court of Ohio County by the administrator of a decedent's estate against the heirs at law of said decedent for the settlement of her estate. A nephew of plaintiff's intestate set up in his answer a demand against the estate for the sum of Six Thousand Dollars ($6,000.00) evidence by a promissory note of the decedent, dated May 29, 1901. There were three defenses offered against this note: (1) Want

of consideration, (2) mental incapacity of maker, and (3) fraud and undue influence in the procurement of the same. The commissioner, to whom the cause was referred to ascertain the property and the debts of the decedent, disallowed the claim and the court confirmed the report. The Supreme Court of Appeals reversed the trial court and decreed the said note to be a debt against the said estate. The maker of the note was a lady eighty-three years old at the time of her death, October 7, 1901. She had been in bad health for some time. In the fall of 1900, she had a severe spell of sickness from which she had partially recovered in the spring of 1901. In April of that year, she was confined to her room and bed for several days. As is usual in all such cases, there was a conflict in the evidence as to her mental condition at the time she executed said note. Many of the witnesses were of the opinion that she was wholly incapable of transacting business, and others were of contrary belief. Some of the witnesses testified that in April, 1901, or May of that year, the deceased talked disconnectedly, her mind sometimes wandering from the subject of conversation, and that she talked more intelligently of things that had happened several years prior to the date of the conversation than of recent happenings. Her family physician testified that he attended her in October and November of 1900, and in April, 1901; that her mental condition was such, in his opinion, that she was easily influenced by anyone whom she liked, and that her mind was weakened through age, infirmity and disease, and he defined her ailment as senile dementia and stated that he doubted if she had sufficient ability to recognize any claim against her. Another witness testified that in the spring of 1901, she came to the house of the decedent and talked to her, and that she was very forgetful, nervous and conversation broken. One day she claimed she owed the note in question, and then immediately she would say she did not owe it. She was seen in stores purchasing supplies, carrying her money with her wrapped in

packages, and deposited in a tin bucket. The Court, in the opinion, says (p. 168):

> "The evidence wholly fails to establish mental incompetency . . . Assuming it to be true, however, that her conversation, at times, was somewhat disconnected and that persons who knew her, even a physician, were of the opinion that she did not possess the mental strength and capacity, obtaining ordinarily in the transaction of business, in other words, average business capacity, the facts disclosed, concerning her conduct and powers, having greater probative value than mere opinions, and the burden of proof being on the party alleging incompetency, we have no hesitancy in saying the evidence fails to establish it. Old age, sicknes, abatement of mental vigor and impairment of memory does not, under our decisions, rebut the legal presumption of mental competency to transact business."

In the case of *Eakin* v. *Hawkins,* 52 W. Va. 124, the Court says on p. 126:

> "In the absence of fraud, imposition or undue influence, mere weakness or feebleness of understanding is not sufficient to over-throw the party's deed . . . His mind may be weak and debilitated as compared with what it once was, the memory enfeebled, the understanding be weak, the character and demeanor eccentric, and he may not have capacity to transact all of the ordinary business of life; still, if he understands the nature of the act he does, recollects the property he is disposing of, and the person to whom he grants it, and how he desires to dispose of it, his act is valid. Buckey v. Buckey, cited; Nicholas v. Kershner, 20 W. Va. 251; Kerr v. Lunsford, cited. It is admitted by practically all the witnesses in this case that, at the time the deed was made, Hawkins had sufficient intellect and mental power to know and understand what he was disposing of and that, in executing the deed, he was parting with his property. All that is claimed by them is that he was easily persuaded and that he had not fair conception or understanding of values, in consequence of which he was without capacity to do busi-

> ness, in the ordinary sense of the term, and yet it is not pretended that he was, in any sense, a victim of fraud or undue influence. Under the well established principles and rules above referred to, the evidence falls far short of establishing such mental weakness or unsoundness of mind as will invalidate a deed."

In the case of *Black* v. *Post*, 67 W. Va. 253 Rebecca Black conveyed to A. V. Post 140 acres of land in Upshur County by deed dated December 25, 1906. On January 14, 1907, the plaintiff brought this suit to set aside and declare void said deed on the following grounds: (1) mental incompetency in the grantor to make a conveyance; (2) inadequacy of consideration; and (3) fraud in the procurement of the deed. The defendant answered and denied specifically all the allegations of the bill. The case turns upon whether, or not, the depositions of witnesses, which were very voluminous, sustained the charges of the bill. The evidence consisted largely of the opinions of the neighbors of the grantor concerning her competency and incompetency. Many of the witnesses were of the opinion that she was not competent; one witness went so far as to say that he did not believe she knew right from wrong. Others stated that they did not regard her as competent to transact business. She was eccentric and peculiar in her manner, thought and speech. For twenty years before her death she held her property in her own name and dealt with it herself, buying and disposing of the products of the farm. She knew the value of money and how to keep it. She was close and penurious, but always met her obligations with promptness and honesty. The Circuit Court cancelled the said deed. The Supreme Court of Appeals reversed the lower Court, holding that the evidence was not sufficient to show that the grantor was not mentally capable of making a deed at the time.

In the case of *Carrigan, Committee* v. *Davis*, 84 W. Va. 473, plaintiff sought to cancel a deed on two grounds: First,

that his ward was non compos mentis and incapable of understanding the transaction of making a deed; and, second, that the defendant asserted an undue influence over his ward and induced him to make the deed by fraudulent and improper means. Many witnesses testified concerning grantor's mental capacity and their opinions were diametrically opposed to one another. Two or three physicians and many lay witnesses stated in their opinions that he was not mentally capable of transacting business, but the doctors who testified made no particular examination of him, and only a few of plaintiff's other witnesses had any personal transactions or dealings with him. Their opinions were based on general impressions received from conversations. On the other hand witnesses for the defendant testified that the grantor was capable of understanding and appreciating the nature of a business transaction. The trial Court held that mental incompetency was not shown, however, the Court annulled the deed on the ground that it was made by fraudulent means and undue influence. The Supreme Court of Appeals reversed the lower court and dismissed plaintiff's bill. A rehearing was granted but the Court refused to change its former decision.

The insufficiency of petitioners' testimony is made more apparent when we consider that many of their non-expert witnesses expressed their opinion of Boone's mental condition without giving any facts, or unimportant and frivolous facts, upon which to base such opinion. Most of the witnesses who attempted to recite acts in the life of Boone as the basis of their opinion for his mental incompetency gave instances such as his walking in the street, picking up old nails and strings, objecting to the destroying of old shoes, getting in the way of trucks, speaking to the same person several times a day or failing to speak at all, repeating the same story, rubbing his head, hard to engage in conversation, talking about things of the past, deep study, inattention to things about him, and other similar acts. All these things can be observed

in the life of any man over a period of eight or ten years. Many of these things may have been due to habits formed in earlier years and others are characteristic of old age generally. Some of these acts are evidence of wisdom, rather than incompetency. The two colored housemaids, Wheeler Boone, a nephew, and H. A. Moseley, a brother-in-law, are the only witnesses who testified to illusions and conduct of Boone prior to 1930, which might not be found in the life of any normal man. The testimony and opinion of such witnesses is entitled to but little weight.

Farnsworth v. *Noffsinger*, 46 W. Va. 410, Syl. 2;
Ward v. *Brown*, 53 W. Va. 227 (263);
Lynch v. *Doran*, 93 Mich. 395;
Beverly v. *Walden*, 20 Gratt. 147 (159);
Prentess v. *Bates*, 88 Mich. 567;
Carpenter v. *Calvert*, 83 Ill. 62.

The reason for the rule requiring non-expert witnesses to state facts upon which they base their opinion does not apply when a witness expresses an opinion that a person is sane because a sane person does not give manifestations of erratic acts and eccentricities which usually mark the conduct of a diseased mind.

State v. *Price*, 115 S. E. 393 (W. Va.);
State v. *Soper*, 148 Mo. 217, 235;
State v. *Toney*, 127 S. E. 35 (W. Va.);
Campbell, et al. v. *Mott*, 200 Io. 948, 205. N. W. 770;
Jones v. *Collins, et al.*, 51 Atl. 398 (N. J.);
Davis v. *Dixon*, 300 Pac. 378 (Okla.);
Lucas v. *MacDonaldson, et al.*, 102 N. W. 532, (Mo.);
Russell v. *State*, 17 Ala. App. 436; 87 So. 221.

(3) *IT IS PRESUMED THAT J. A. BOONE WAS SANE UNTIL HE WAS ADJUDGED INSANE, MARCH 14, 1933.*

Carrigan v. *Davis*, 84 W. Va. 473;
Eakin v. *Hawkins*, 52 W. Va. 124;
White, Committee v. *Mooney*, 73 W. Va. 304;
Black v. *Post*, 67 W. Va. 253.

(4) *IT IS PRESUMED THAT THE JUDGMENTS RENDERED AGAINST J. A. BOONE WERE REGULAR AND VALID AND THAT THE JUDGE AND OFFICERS OF THE COURT PROPERLY PERFORMED THEIR DUTIES.*

Land Co. v. *George*, 96 W. Va. 209, Syl. 2;
State ex rel Conley v. *Thompson*, 100 W. Va. 253, Syl. 3;
Hall v. *Johnson*, 91 F. (2d) 363 at page 364;
15 R. C. L. 880, Sec. 358.

(5) *THE PETITIONERS ARE NOT ENTITLED TO HAVE THE JUDGMENTS AGAINST J. A. BOONE ANNULLED AND SET ASIDE, REGARDLESS WHETHER HE WAS MENTALLY COMPETENT AT THE TIME THEY WERE RENDERED.*

The Court has found and decreed that J. A. Boone was sane when he made and endorsed all of the notes involved and that they are just and legal obligations.

In *Stigers* v. *Brett*, 50 Md. 214, 53 Am. Rep. 319, the Court held that a judgment against one insane at the time, who appeared by attorney in an action at law upon a debt contracted by him when of sound mind, will not be set aside upon the ground of his insanity.

In *Atwood* v. *Lester*, 20 R. I. 660, 40 Atl. 866, the Court held that a judgment rendered, without the appointment of a guardian ad litem, against the maker of a note who was sane at the time of the giving of the note, but insane at the time of

the rendition of the judgment, will not be set aside where he has no defense to the action.

In *Fleming* v. *Seeligson,* 57 Tex. 524, the Court held that a judgment is not rendered void or voidable by the fact that the defendant became insane during the pendency of the suit and after the Court had acquired jurisdiction of the person by citations, appearances and answers, where the defendant was represented by counsel and no suggestion of insanity was made.

In *Dunn* v. *Dunn,* 114 Cal. 210 the Court held that a mortgage and judgment of foreclosure and a sale thereunder of the mortgaged premises will not be annulled at the suit of the heirs at law of the mortgagor upon the ground that she was insane and incompetent to transact business, or to understand the nature of her act, at the time, where the purchaser had no knowledge of such insanity and purchased in good faith and for a valuable consideration.

In the case of *Spurlock* v. *Noe,* 39 L. R. A. 775 (Ky.), the plaintiffs sought to set aside a judgment and sale of land to enforce it on the ground that the judgment defendant was insane at the time said judgment was rendered. The Circuit Court set said judgment and sale aside. The Supreme Court reversed and remanded the cause, with directions to dismiss the suit. In the opinion the Court says (p. 782):

> "The decisive question in this case is whether or not Nathan Noe was of such unsound mind at the time of the rendition of the judgment and the sale of the land as to render the same void or voidable. The presumption of law is that all men are sane, and capable of understanding the nature and effect of contracts, and all suits and proceedings in Court, and, although a party may be in bad health, and his mind, to some extent, impaired, yet if he has sufficient mind to understand and comprehend the nature and effect of contracts, or comprehend and understand the effect and result of legal proceedings, the same are binding upon such per-

> sons. In this case the judgment and sale complained of were rendered at a time when Nathan Noe was going at large, and attending to his own business, without restraint or objection from his friends, or from his numerous family of children. It is true that he was found a lunatic after confirmation of the sale, and by statute the verdict of the jury should have shown the date of his first attack; but, if such was shown by the proceedings, the plaintiffs have failed to exhibit the record in that case. It also appears that one of his sons was appointed his committee in 1884, and, although said Nathan Noe was reported as having no property, no steps were taken by said committee, or anyone else, to set aside the judgment or sale complained of. Public policy requires that the judgments and orders of courts should not be lightly vacated or set aside upon the assumption that the parties against whom the same was rendered were lunatics at the time of such rendition; and, taking all the facts and circumstances proved in this case into consideration, it seems to us that the evidence is not sufficient to establish such unsoundness of mind upon the part of Nathan Noe as to authorize the sale, confirmation, and deed to be set aside or vacated."

See also:

> *Farmers & Merchants Bank* v. *Duke, Adm'r.*, 187 N. C. 385, 122 S. E. 1, 34 A. L. R. 215, Syl. 1; 15 R. C. L. 704, Sec. 155.

Petitioners' evidence, when weighed and considered by the principles of law stated in the foregoing cases, fails to overcome the presumption of Boone's sanity, the presumption of the regularity and validity of the Court's judgment, and falls far short of proving that Boone was mentally incompetent when said judgments were rendered against him.

(6) THE TITLE OF THE PURCHASERS ACQUIRED AT A JUDICIAL SALE CANNOT BE AFFECTED BY THE REVERSAL OR SETTING ASIDE OF THE JUDGMENTS, ORDERS AND DECREES UNDER WHICH THE SALES ARE MADE, IF THE COURT HAD JURISDICTION OF THE PARTIES AND OF THE SUBJECT MATTER.

West Virginia Code 1937, Section 5516 is as follows:

> "If a sale of property be made under a decree or order of the Court, and such sale be confirmed, though such decree or order be afterwards reversed or set aside, the title of the purchaser at such sale shall not be affected thereby; but there may be restitution of the proceeds of said sale to those entitled."

In the annotations to this section of the Code we find the following explanatory note:

> "CONDITION BEFORE ENACTMENT OF THIS SECTION.—Before this section was enacted, a purchaser at a judicial sale was likely to lose his purchase by reversal of the decree of sale for some error in the case, and a few purchasers had the temerity to risk their money for that reason. Purchasers became few, and properties were prevented from bringing anything like market value. Peoples Bank v. Cain, 107 W. Va. 309, 313, 148 S. E. 107."
>
> "PURPOSE OF SECTION.—To cure that unbearable condition of judicial sales (often described on the street as 'like buying a pig in a poke') this section was passed."

We think this section has direct application to the purchases of P. M. Snyder, Equitable Holding Company, Mountain View Realty Company and Beckley National Bank. The Court in said creditors' suit had jurisdiction of the parties, including J. A. Boone and of the subject matter. Boone was sued in said cause as a sane person and legally served with process. Failure to appoint a guardian ad litem for him, even assuming that he was not legally responsible, was not jurisdictional

error which rendered the orders and decrees pronounced against him in said cause, void, but only voidable.

In *Hansford* v. *Tate,* 61 W. Va. 207, 56 S. E. 372, the Court held where one purchases at a judicial sale while a decree is in full force, it is sufficient for him to show that the Court had jurisdiction and that the decree authorized a sale, and a subsequent reversal of the decree will not affect his title, acquired under the sale.

In *Gray* v. *Brignardello,* 68 U. S. 627, Justice Davis, in delivering the opinion of the Court, at page 634, says:

> "It is a well settled principle of law, that the decree or judgment of a court, which has jurisdiction of the person and subject matter, is binding until reversed, and cannot be collaterally attacked. The Court may have mistaken the law or misjudged the facts, but its adjudication when made concludes all the world until set aside by the proper appellate tribunal. And, although the judgment or decree may be reversed, yet, all rights acquired at a judicial sale, while the decree or judgment were in full force, and which they authorized will be protected. It is sufficient for the buyer to know that the court had jurisdiction and exercised it, and that the order, on the faith of which he purchased was made and authorized the sale. With the errors of the court he had no concern. These principles have so often received the sanction of this Court, that it would not have been deemed necessary again to reaffirm them, had not the extent of the doctrine been questioned at the bar."

In *Thompson* v. *Landon Coal Co.,* 77 W. Va. 782, at page 790, the Court says:

> "This Court has frequently held that a sale made under a decree of court to a stranger, or even to a party to the suit, provided he is not the party moving the sale, cannot be set aside for error not jurisdictional. Chapman v. Branch, 72 W. Va. 58; Klapneck & White v. Keltz, 50 W. Va. 331; Perkins v. Phlazgrall, 60 W. Va. 121. Even if the decree of sale be reversed in such

case it cannot affect the purchaser's right. Hansford v. Tate, 61 W. Va. 207."

In *Dunfee* v. *Childs,* 59 W. Va. 225, 53 S. E., 209, the Court held:

"Where a party to a suit interested in a decree for sale of a debtor's land by having a debt decreed him against the land is the purchaser under the decree of sale, and he then conveys the land, after confirmation of the sale and before a bill of review or appeal to reverse the decree of sale, to a bona fide purchaser for valuable consideration without notice actual of error in the decree, such purchaser's title is not affected by a reversal of the decree of sale on bill of review or appeal."

In *Foggin* v. *Furbee,* 89 W. Va. 170, 109 S. E. 754, the Court held:

"If, after a purchase of land sold under an erroneous decree of sale, by a party to the suit in which it was entered and confirmation of the sale, and before any steps have been taken to correct the error, the purchaser conveys the property to a stranger for value, the legal title passes by his deed; and, if, on subsequent reversal of the decree, such stranger is not made a party, nor restitution of the title in any way affected, the legal title remains in him, even though it may be affected with an equity in favor of other persons, by reason of his having purchased with knowledge of facts rendering his title voidable."

In *Capehart's Ex'r.* v. *Dowery, et al.,* 10 W. Va. 130, Syl. 4, is as follows:

"Where a sale of property is made under an order of sale in an attachment suit, in a case where the parties interested in the property are before the Court and the sale is confirmed, and the order of sale, the sale itself, and the order confirming the sale are free from fraud under section eight, of Chapter one hundred and thirty-two of the Code, the title of the purchaser at such sale is not affected by the reversal or setting aside of the order under which the sale is made."

In *Blankenship* v. *Mongini*, 105 W. Va. 530, Syl. 1 is as follows:

> "After confirmation of a judicial sale to one not a party to the proceedings, the sale will not be disturbed, in the absence of fraud or other adventitious circumstances, for error which does not go to the jurisdiction of the Court."

In *Chapman* v. *Branch*, 72 W. Va. 54, at p. 58, the Court says:

> "We think it settled law in this State, that the title of an immediate purchaser, and of remote purchasers, not parties under a judicial decree, cannot be disturbed or affected by reversal on appeal, or on setting aside of a decree of sale for mere error therein, not going to the jurisdiction of the Court, and that Smith and those holding under him are now protected by section 8, chapter 132, Code 1906. Sinnett v. Cralle's Admr., 4 W. Va. 600; Martin v. Smith, 25 W. Va. 579, 586; Dunfee v. Childs, 45 W. Va. 165; Stewart v. Tennant, 52 W. Va. 560, 7 syl.; Perkins v. Pfalzgraff, 60 W. Va. 121; Hansford v. Tate, 61 W. Va. 207. The reasons for this rule and the legal principles underlying it are sufficiently covered by the opinions in the cases cited, and particularly in the cases of Dunfee v. Childs and Perkins v. Pfalzgraff, supra, and we need not reiterate them. These cases or some of them apply this rule to infants as well as adults proceeding by prochein ami before majority, as they may, Poling v. Poling, 61 W. Va. 78; Seymour v. Alkire, 47 W. Va. 302, 305, and cases cited, or in proper person after disability removed either under section 7, chapter 132, Code, or by motion, original bill or bill of review to set aside such decree of sale."

Let us apply the principles stated in the above cases to the facts of this case. P. M. Snyder was not a party to the general creditors' suit. However he was a judgment creditor of J. A. Boone and his judgment lien was proven in said suit. He purchased at the Special Commissioner's sale a part of J. A. Boone's real estate and paid $4,000.00 for it. He received

no part of this money, nor anything of value from the sale of Boone's property.

Mountain View Realty Company was not a party to said suit, neither was it a creditor of J. A. Boone. It was a stranger to said general creditors' suit. It purchased at the Special Commissioner's sale all of Boone's real estate in Fayette County, except that purchased by P. M. Snyder.

The Equitable Holding Company was not a party to said suit, neither was it a creditor of J. A. Boone. It was also a stranger to said general creditors' suit. It purchased from the Beckley National Bank all the Raleigh County real estate of J. A. Boone, except that purchased by Mike Verde. At the time of the aforesaid purchases, neither P. M. Snyder, Mountain View Realty Company, nor Equitable Holding Company had knowledge or information of any alleged mental infirmity on part of the said J. A. Boone and all of said purchasers bona fidely acquired title to said real estate before any suit was instituted to set aside the orders and decrees in said general creditors' suit. None of said purchasers received any benefit either directly or indirectly from the said Special Commissioner's sales. All of these parties stand in a position of a stranger to the general creditors' suit and purchased real estate upon their faith in the provisions of said statute against all irregularities except such as affect the jurisdiction of the Court. There can be no successful contention that the Court in said suit did not have jurisdiction of both the subject matter and the parties.

(7) *ASSUMING THAT J. A. BOONE WAS NOT LEGALLY RESPONSIBLE WHEN THE ORDERS AND DECREES WERE RENDERED AGAINST HIM, THEY CAN NOT BE SET ASIDE, AND THE DEEDS CANCELLED, UNLESS THE PARTIES AFFECTED THEREBY ARE RESTORED TO* STATUS QUO.

J. A. Boone received a direct benefit from the proceeds of nearly all the notes involved. In some instances he borrowed money for his personal use and gave his individual notes. In other instances the corporations in which he held a large amount of stock, either borrowed money for their immediate use or gave their notes for past indebtedness, endorsed by J. A. Boone and his brothers, to pay for supplies furnished in the necessary continuation and preservation of said corporations. The evidence shows that none of the judgment creditors had any notice of any alleged mental incompetency of Boone and that the purchasers of his real estate and personal property paid a valuable consideration therefor and without notice of any defect in their title.

Morris, Adm'r., et al v. *Hall, et al, supra;*
Atlanta Banking & Svgs. Co. v. *Johnson, Adm'r., Etc.*, 175 S. E. 904;
Dean v. *Goings, et al*, 192 S. E. 826, Syl. 3;
14 R.C.L. 595, Sec. 49;
9 AM. JUR. 384;
ANNOTATIONS 46 A.L.R. 416;
95 A.L.R. 1442.

(8) *THE DISTRICT COURT ERRED IN RENDERING JUDGMENT IN FAVOR OF H. A. MOSELEY, AS EXECUTOR OF THE WILL OF J. A. BOONE, AGAINST BECKLEY NATIONAL BANK, EQUITABLE HOLDING COMPANY, MOUNTAIN VIEW REALTY COMPANY AND P. M. SNYDER.*

(a) Because the Master found and the Judge has decreed that the deeds from the Special Commissioners to the purchasers of the real estate were voidable, which means that the purchasers were entitled to possession of the property until the deeds were annulled.

(b) Because the judgments are based upon net income received from the rent and sale of the property, while the purchasers were in rightful possession of the same.

(c) Because it is inequitable and unjust to take a judgment against said parties without crediting them with the amount they paid for the real estate.

The money judgments are made up as follows, (App. p. 6-9):

BECKLEY NATIONAL BANK:

Net income from Boone's real estate during the period bank held the property, to-wit, March 20, 1931 to March 26, 1932		$ 3,000.00
Amount for which the bank sold part of property to Mike Verde		4,500.00
Interest on these two items from Jaunary 1, 1932 to April 4, 1940		3,750.00
Amount for which bank sold 284 shares of Raleigh Steam Laundry stock	$24,140.00	
Less the aggregate of four notes	11,050.00	13,090.00
Interest on last item from January 15, 1931 to April 4, 1940		7,318.48
TOTAL		$31,658.48

EQUITABLE HOLDING COMPANY:

Net income from Boone's real estate purchased by said corporation from March 26, 1932 to January 1, 1938, inclusive	$18,517.89	
Less paid Tola A. Boone for her dower	10,280.00	$ 8,237.89
Interest to March 4, 1940		2,666.62
TOTAL		$10,904.51

MOUNTAIN VIEW REALTY COMPANY:		
Net income from Boone's real estate purchased by said corporation from July 19, 1930 to December 27, 1937		$10,047.65
Interest to April 4, 1940		3,667.21
TOTAL		$13,714.86
P. M. SNYDER:		
Net income from Boone's real estate purchased by him from April 18, 1931 to November 18, 1937		$ 5,152.50
Due Snyder from Boone on original loan of $15,000.00	$6,600.00	
BALANCE DUE SNYDER		$ 1,447.50

Under the terms of the final decree of the District Court, the Beckley National Bank, in addition to being required to pay the aforesaid judgment, loses $38,200.00, which it paid for Boone's Raleigh County real estate, less $9,777.09 received from the Special Commissioners from the proceeds of the sale of said property. Notwithstanding, J. A. Boone's estate is indebted to said Bank for more than $70,500.00.

The Mountain View Realty Company, Equitable Holding Company and P. M. Snyder, in addition to paying the above judgments, lose the amount they paid for the real estate they bought and also lose the property. It appears that the judgments include interest at six per cent on net income from the real estate before it was due and payable. The effect of the final decree upon these parties is absolute proof that it is erroneous and inequitable.

The Court, in its final decree, reserves for future determination any decree against Snyder for rents and royalties, including the question of the right of said Snyder to effect the balance of the $15,000.00 note against rents and royalties accrued since the death of J. A. Boone. But he loses the property he bought and also the amount he paid for it.

The Special Master reported that the deeds from the Special Commissioners to the purchasers of the real estate were voidable and the Court confirmed his report. These deeds, therefor, conveyed title to the grantees subject to being defeated in a suit brought to annul said deeds. Therefore, the purchasers were entitled to continuous possession under their deeds until they were annulled. The rights of the purchasers became vested upon the confirmation of the sale of the real estate by the Special Commissioners, February 16, 1931, and from that date forward they were entitled to possession and by reason thereof were entitled to collect the rent from the property. If we are correct in our reasoning, then H. A. Moseley, as Executor, is not entitled to a money judgment against the above named parties.

Eakin v. *Eakin*, 83 W. Va. 512, 98 S. E. 608;
Cale's Adm'r. v. *Shaw*, 33 W. Va. 299, 10 S. E. 637;
Klapneck v. *Keltz*, 50 W. Va. 331, 40 S. E. 571.

(9) *THE PETITIONERS HAVE NO RIGHT TO MAINTAIN AND PROSECUTE THIS SUIT AND TO RECOVER THEREIN FOR THE FOLLOWING REASONS:*

(1) Because they have made no showing to the effect that they have a meritorious defense to the judgments against J. A. Boone, or that they have been deprived of any legal right or property because of his alleged mental disability.

The petitioners, whether they acquired an interest in Boone's property by inheritance or by will, are not entitled to said property until the debts are paid. The record shows that J. A. Boone's indebtedness aggregated almost $300,000.00. (Decree, Plfs. Ex. 19). (App. p. 275). His property, both real and personal, was sold at public auction and at the highest competitive bid for $72,340.00. There is no direct evidence in the record about the value of his property. The respondents made a motion for re-reference to a special master on this matter and the Court refused it. (App. p. 27).

The highest competitive bid at a public judicial sale, properly advertised and conducted, ordinarily is accepted by courts as a fair criterion of the value of the property sold, in the absence of evidence to the contrary.

It is clearly apparent that he was insolvent at the institution of the general creditors' suit, April 19, 1929.

Blankenship v. *Mangini,* 105 W. Va. 530, 143 S. E. 30;
National Bank v. *Ralphsnyder,* 113 W. Va. 480, 169 S. E. 89;
Benet v. *Ford,* 113 Va. 442, 74 S. E. 394;
69 C. J. 1224, Sec. 2567 and Sec. 2569;
24 C. J. 458, Sec. 1260;
Am. Bk. & Trust Co. v. *Douglas,* 75 W. Va. 207;
Lewis, et al., v. *Overly, Admr.,* 31 Gratt. 601;
McClung v. *Sieg,* 54 W. Va. 467;
Van Winkle v. *Blackford,* 54 W. Va. 621.

The petitioners cannot hope to realize anything from J. A. Boone's estate because all of it and more too is needed to pay the debts and obligations of J. A. Boone, contracted when he was legally responsible. The petitioners have not been prejudiced by said judgments and the sale of Boone's property. If the judgments should be set aside and the deeds annulled, Boone's creditors would have first right to the property to pay the indebtedness of the insolvent estate. The petitioners, therefore, have not been prejudiced by the alleged error in failing to appoint a guardian *ad litem* for J. A. Boone.

In the chancery cause of *People's Bank of Philippi, etc.,* v. *Cain, Administratrix, etc.,* the Supreme Court of Appeals of West Virginia held (107 W. Va. 309, 148 S. E. 107):

> "Error in a decree will not justify a reversal thereof on an appeal therefrom by a party who is not prejudiced by the error."

In discussing the matter of setting aside the decree, the Court said (p. 313):

> "A reversal of the decree for error will be of no benefit to appellant for the land cannot be re-sold. Mitchel (the purchaser) was not a party to the suit and in no way caused the error or sale. No exception was made to the report of sale for inadequacy of price at which it sold, and no objection interposed to the decree of confirmation. The reason for fixing the liens prior to sale, in so far as it affects appellant, has been lost by the sale and confirmation."

Continuing, the Court said:

> "What benefit, therefore, will it be to her (appellant) if the decree of sale be reversed? Why should she complain of an error, the correction of which would avail her nothing? The purchase money takes the place of the land, and is held under the decree subject to her right to defeat Post's alleged judgment. *As a basis of reversal of a judgment or decree for error, a litigant must show that the error is prejudicial to him. This proposition is so elementary that citation of precedent and authority would serve no useful purpose, and would only encumber the reports of our decisions.*"

The Court, in concluding its discussion of the cause, said:

> "But she (appellant) can receive no personal benefit in her own right, or as administratrix, by a reversal, and we reluctantly decline to disturb the decree."
>
> *Ruhl & Co.*, v. *Nester, et al.*, 52 W. Va. 610;
> *Stribling* v. *Splint Coal Co.*, 31 W. Va. 82;
> *State* v. *Musgrave, et al.*, 153 S. E. 515 (W. Va.).

The burden is upon the petitioners to show that they have been prejudiced by not having a guardian *ad litem* appointed for J. A. Boone.

> *First Nat'l Bank* v. *Pritchard*, 113 W. Va. 295, 167 S. E. 745, Syl. 3.

The petitioners have totally failed to show and in fact do not attempt to show that if the judgments, decrees, sales and deeds of which they complain are set aside, a different result would probably be reached upon a new hearing, and they have

totally failed to prove that any injustice has been done them in any of the proceedings against J. A. Boone, heretofore had. Some of the creditors of Boone were paid in full out of the proceeds of his property, but not all of these creditors are parties to the instant suit and a re-sale of said property and re-distribution of the proceeds is legally impractical. The creditors who received nothing in said creditors' suit are not asking for a resale and do not desire it. All of Boone's real estate has passed into the hands of innocent purchasers and it is practically impossible to esablish a *status quo* among those who have been affected by the proceedings. The Beckley National Bank paid $38,200.00 for J. A. Boone's Raleigh County real estate. The Mountain View Realty Company and P. M. Snyder paid $10,000.00 for his Fayette County real estate. The Beckley National Bank paid for J. A. Boone's personal property $29,140.00. These amounts were paid in accordance with the Raleigh County Circuit Court decrees of 1930 and 1931, to the creditors of J. A. Boone. The final decree makes no provision for restitution from those who were paid, assuming such a decree could be legally entered. Boone owed Beckley National Bank $70,509.93. This does not take into account the notes mentioned by Isaac McKinney in his testimony, on which notes judgments were not taken. Said Bank, by loans to Boone and by purchase of his real estate, actually paid out $108,709.93, and still the executor of Boone's will takes a money judgment against it for the sum of $31,658.48.

(2) The petitioners by their acts and conduct are estopped from prosecuting and recovering in this case.

(a) Tola A. Boone sat by and looked on the proceedings wherein her husband's property was sold, and after the judicial sales, offered to purchase it from those who bought, thus admitting the regularity of the proceedings and the passing of title. She did not suggest that her husband was mentally incompetent until March 14, 1933, about two years after the Circuit Court of Raleigh County had confirmed the sales.

(b) Tola A. Boone was paid in 1935 by the Beckley National Bank and Equitable Holding Company $10,280.00 for her dower right in the Raleigh County property. She brought suit in the Federal Court (Cause 3508) asking for a settlement of her dower right in Boone's Fayette County lands. Under the statute of the West Virginia Code, 1937, Section 4092, she was not entitled to both dower and an interest in her husband's estate under his will. Her claim for dower was inconsistent with her contentions that the title to Boone's property did not pass in the creditors' suit. By accepting dower, she relinquished her right to a distributive share of a one-third interest in her husband's estate under his will. The statute is as follows:

> "If a person make provision by will for his or her surviving wife or husband, such provision shall be construed to be in lieu and bar of dower and distributive share of the personalty in the estate of the deceased consort, and such provision, unless the same be renounced as provided in the preceding section, shall be all that such surviving wife or husband shall take of the estate of the deceased consort, unless it clearly appears from a construction of such will, and the attendant facts proper to be considered in connection with it, that the testator intended the surviving wife or husband to take the estate or interest given by the will in addition to his or her dower and distributive share of the personalty."

(c) Tola A. Boone and her sons assumed successive inconsistent positions which are mutually contradictory and forbidden under the law.

(d) Positions of many of the respondents and creditors of Boone have been changed since his real estate was sold. The property has been resold and buildings erected thereon, at great cost and expense. Stock ownership in all of the corporations, which were purchasers of Boone's property, has changed. Two banks have been dissolved and another one a party defendant herein, organized by consolidation. New corporations have come into existence, now parties to this suit.

(e) J. A. Boone and Tola Boone were adequately represented by counsel, particularly in the general creditors' suit and had an opportunity to make defense, if they had any to make, before all the rights and equities attached. It is true, Tola A. Boone was not a party to said suit, but she and her husband frequently consulted his counsel together in regard to the matters involved herein and she was fully aware of all that was going on.

The general creditors' suit was instituted in April, 1929. An order of reference was had August 28, 1929, to W. A. Thornhill, Commissioner in Chancery. He made and filed his report June 20, 1930. There was a decree of sale of Boone's property November 15, 1930. His Raleigh County property was sold January 15, 1931 and Fayette County properties January 31, 1931, and the sales were confirmed February 16, 1931, and deeds were made pursuant thereto. J. A. Boone was adjudged insane March 14, 1933, and he died May 30, 1935. Tola A. Boone and her children elected to keep silent and wait until all of these things had happened and then instituted this suit November 13, 1935, attacking all the foregoing proceedings. If J. A. Boone was mentally incompetent nobody knew it any better than Tola A. Boone and her family. If they had a defense, the circumstances called upon them to speak, and having failed to do so they cannot now be heard to impunge the validity of the judgments, orders, decrees and deeds. They are guilty of laches for which they have no excuse.

McMullen v. Matheny, 104 W. Va. 317;
Lannerd, et al., v. *Burnan, et al.*, 93 W. Va. 744;
Camden v. *Fink Coal & Coke Co.*, 106 W. Va. 312;
Curence, Ex'rx v. *Ralphsnyder, et al.*, 108 W. Va. 194;
ANNO. 50 A. L. R. 668, et seq.;
10 R. C. L. 395-396, Sec. 142, et seq.;
2 POMEROY'S EQUITY JUR., Sec. 815.

IV

CONCLUSION

In conclusion, we submit that a writ of certiorari to review the decree entered in this suit November 13, 1940, in the United State Circuit Court of Appeals for the Fourth Circuit should be refused for the following reasons:

1. The said decision and decree of the Circuit Court of Appeals is not in conflict with applicable local decisions of the Supreme Court of the State of West Virginia.

2. The said decision and decree of the Circuit Court of Appeals does not violate nor disregard rule 52(a), of the Federal Civil Procedure for the District Court of the United States, because the final decree of the District Court is clearly erroneous.

Respectfully submitted:

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